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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT
OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XXV.

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VOL. XXV.

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LEE v. STATE.

[92 ALABAMA, 15.]

MURDER — SELF-DEFENSE. — A man, when upon his own land, is not to be regarded as at bay, so as to be under no duty to yield further to an assailant, unless he is in his house, or within the curtilage or space usually used and occupied for the purposes of the house. When beyond its precincts, though upon his own land, he is under the duty to retreat, when retreat with safety to himself is practicable. Hence he is not justified in committing a homicide simply from the fact that he had retreated to and was upon his own land, but not within the curtilage.

INDICTMENT for murder. Conviction of manslaughter in the first degree.

Watts and Son, for the appellant.

William L. Martin, attorney-general, for the state.

WALKER, J. The evidence tended to show the following state of facts: The appellant, Ed Lee, rented a large farm during the year 1890, upon which he resided himself, and a portion of which he subrented that year to one Monroe Walker. Lee rented the same farm for the year 1891, and continued to occupy it. Walker made arrangements to work on the plantation of one Westcott for the year 1891, but, with Lee's permission, left his family on the latter's place, until a house could be prepared for them on the Westcott place. After January 1, 1891, Walker had no right on the Lee farm, except to occupy with his family the house thereon until a dwelling could be built for them on the Westcott place. After the first of the year, Walker worked on the latter place, his

wife remaining temporarily on the Lee place, and working there as a laborer, and he going and staying there at night when he wished to do so. The house in which Lee lived was about a quarter of a mile from the house occupied by Walker's family, and was on the same place. About nine o'clock at night, on the — day of February, 1891, Lee went over to the house occupied by the wife of Walker, and was there talking to her, in the presence of her daughter, about some work he wished her to do the next day, when Walker came in, made some exclamation, and grabbed a chair, and tried to strike Lee. Walker's wife interfered. Lee went out of the house, walked off about fifteen steps, and stopped in a path leading from that house in the direction of the house in which he lived. After Lee got out of the house, Walker's wife locked the door. Walker went to the fire-place, picked up an iron bar used for a poker, then went to the door, pushed his wife out of the way, unfastened the door, and ran out after Lee, and approaching towards him with the iron bar, was fatally shot by Lee with a pistol. The night was dark, and it was raining at the time. There was no fence around the house in which Walker's wife was staying.

The exceptions to portions of the charge given by the trial court, and to the refusal to give the charges requested by the defendant, raise but the single question as to whether or not it was the duty of the defendant to retreat, after getting out of the house and upon his own land. In behalf of the appellant, it is urged that after he got upon land the right to the exclusive possession of which was in him, he was not bound to retreat farther, though retreat was entirely practicable, but was entitled to stand his ground and protect himself, even to the taking of life, if he was without fault in bringing on the difficulty. We have not been cited to, nor have we found, any authority to support the proposition that the fact that one happens to be upon any part of his own land thereby secures to himself all the rights deducible from the principle which is illustrated by the maxim, that every man's house is his castle. It is familiar doctrine, that in order to entitle a person to the benefits of the plea of self-defense against the charge of homicide, he must have employed all means in his power, consistent with his safety, to avoid the danger, and avert the necessity of taking life; and he must have retreated, if retreat was practicable: *Carter v. State*, 82 Ala. 13. In the old books of the law, the phrases, "retreat

to the wall," or "retreat to the ditch," were much in vogue, as figurative expressions of the rule, that in order to avoid the necessity of taking life, combat must be declined, so long as the avenues of escape are open: 1 Hale P. C. 479-483; 1 Russell on Crimes, 661. As one who has been forced to the wall, or to the ditch, can withdraw no farther, the law says he may there stand at bay, and resist assault, even to the taking of life. Upon like principles, a man's dwelling was regarded as the limit of retreat for him. In the turbulence of early times, men made their habitations holds of defense, and were often compelled to protect themselves therein. One's dwelling was regarded as his place of refuge. Its sanctity in this regard was fully recognized by the law. A man in his own house was treated as "at the wall," and could not, by another's assault, be put under any duty to flee therefrom: 1 Bishop's Crim. Law, sec. 858; Kerr on Homicide, sec. 180; *Brinkley v. State*, 89 Ala. 35; 18 Am. St. Rep. 87. A killing in defense of one's dwelling may be excusable in the eye of the law, when there would be no legal justification for the taking of human life, in like circumstances, to prevent a trespass upon property not the dwelling-house: *Carroll v. State*, 23 Ala. 28; 58 Am. Dec. 282; *Simpson v. State*, 59 Ala. 1; 31 Am. Rep. 1. This shows the solicitude of the law to secure one's abode as a haven of protection for him, and that the peculiar inviolability attaching to a man's habitation does not extend to his other property. It would seem that the special privileges pertaining to a man in his own habitation are available for his protection only while he is in such space as is usually occupied for the purposes of the dwelling and the customary out-buildings: *Pond v. People*, 8 Mich. 150-181. The very circumstance of one being within the precincts of his dwelling, or of his business-house, serves as a warning to deter an assailant from intruding therein. No such evidence as a disposition to avoid combat, or to get out of the reach of danger, is afforded by the conduct of one who, when assaulted, merely withdraws to his own land, and there halts in a position exposed to attack. Manifestly, he has not availed himself of such shelter and protection as his house affords. He has not sought what is known of all men as an asylum of safety. His act is not calculated to give pause to one in pursuit. The common law would not say that he had gone to the wall. And we cannot say that he had fulfilled the duty of retreat. Nothing has been found in

the books to indicate that a man, when upon his own land, is to be regarded as at bay, so as to be under no duty to yield further to an assailant, unless he is in his house, or within the curtilage or space usually occupied and used for the purposes of the house. When he is elsewhere upon his own land, the reasons which excuse him from withdrawing from the place which is to him as his castle and fortress do not apply: *Jones v. State*, 76 Ala. 8; note to *State v. Patterson*, 12 Am. Rep. 212. Not until he has reached this place of refuge can he claim the protection and privileges afforded thereby. When beyond its precincts, though upon his own land, he is under the duty to retreat, when retreat with safety to himself is practicable. This was the purport of the charges to which exceptions were reserved. The charges requested by the appellant are not reconcilable with the conclusion here announced. They were properly refused.

Affirmed.

HOMICIDE — SELF-DEFENSE. — A man may defend himself in his own house without retreating, but having retreated, he can no longer invoke this principle, or strike with a deadly weapon, unless it appears reasonably necessary to do so to save himself from great bodily harm: *Martin v. State*, 90 Ala. 602; 24 Am. St. Rep. 844, and note.

ROSS v. STATE.

[92 ALABAMA, 28.]

MURDER — REASONABLE DOUBT. — A CHARGE INSTRUCTING the jury in a murder case to acquit, unless “indubitably certain” of defendant’s guilt, or if from the evidence they are unable to say “where the truth indubitably lies,” is properly refused, as not sufficiently defining reasonable doubt, and as making any possible speculative or imaginary doubt sufficient to acquit.

INDICTMENT and conviction for murder. The defendant requested the following charges, and excepted to the refusal to give them: “The jury ought to acquit the defendant, if, after a rational sifting and weighing of the whole evidence in this case, they are not indubitably certain that he is guilty.” The court instructs the jury that they are the sole and exclusive judges of the credibility of the witnesses, and of the weight of the testimony. In other words, the jury are the sole determiners of the questions of fact; and if, according to the evidence against the defendant, he would be guilty, but

according to the evidence in his favor he would be innocent, and the jury cannot tell where the truth indubitably lies, this would furnish a just ground for a reasonable doubt, and the defendant ought to be acquitted."

William L. Martin, attorney-general, for the state.

WALKER, J. The jury are not required to acquit, in a criminal case, because they are not "indubitably certain" that the defendant is guilty, or because, on the whole evidence, they may be unable to say "where the truth indubitably lies." Obedience to the two charges requested by the defendant would have required an acquittal, unless the evidence of guilt had been such as to remove all doubt from the minds of the jury: Webster's International Dictionary. Under these instructions, any possible, speculative, or imaginary doubt would have been sufficient to prevent a conviction. That the doubt which the jury are authorized to regard as an obstacle in the way of a conviction must be a reasonable doubt, and that the statement of the requisite of reasonableness is essential to the correctness of a charge on the subject, are familiar and well-settled propositions: *Perry v. State*, 87 Ala. 30; *Humbree v. State*, 81 Ala. 67; *Linton v. State*, 88 Ala. 216.

The refusal to give the two charges requested by the defendant was manifestly proper.

Affirmed.

CRIMINAL LAW — REASONABLE DOUBT. — A reasonable doubt is one that would cause a person to pause and hesitate before doing anything that would constitute a serious transaction in his life: *Commonwealth v. Miller*, 139 Pa. St. 77; 23 Am. St. Rep. 170, and note. An instruction to a jury, that unless you are satisfied beyond a reasonable doubt of defendant's guilt, it is your duty to acquit him, is correct: *People v. Christensen*, 85 Cal. 568; *Hemingway v. State*, 68 Miss. 371; *Aneals v. People*, 134 Ill. 401.

STOKES v. STATE.

[92 ALABAMA, 73.]

CRIMINAL LAW — NIGHT-WALKING. — A WOMAN WHO STROLLS THE STREETS AT NIGHT for the unlawful purpose of picking up men for lewd intercourse, though without expectation of gain, is guilty of night-walking.

INDICTMENT and conviction against Nora Stokes of the offense of being a night-walker. The count in the indictment upon which a conviction was asked was as follows: "The grand jury further charge that Nora Stokes was a common night-walker, and did walk and ramble the streets and common highways in the city of Montgomery at unreasonable hours of the night, without having any lawful purpose, and without any necessity therefor, for the unlawful purpose of picking up men for lewd intercourse," etc.

William L. Martin, attorney-general, for the state.

COLEMAN, J. The defendant was convicted of the offense of night-walking. A night-walker has been defined to be one who has a habit of being abroad at night for the purpose of committing some crime, of disturbing the peace, or doing some wrongful or wicked act. Night-walking, at common law, is a common nuisance: 1 Bishop's Crim. Law, 7th ed., sec. 502, and note. Night-walkers are persons who stroll the streets at night for immoral purposes, or, as charged in the indictment, "for the unlawful purpose of picking up men for lewd intercourse," and are indictable at common law: 2 Wharton's Crim. Law, sec. 1446. Persons who eavesdrop men's houses, "to hearken after discourse, and thereupon to frame slanderous and mischievous tales, to cast men's gates, carts, and the like," are night-walkers: *Thomas v. State*, 55 Ala. 260. The expectation of gain is not an essential ingredient to constitute the offense of "night-walking," and the refusal of the trial court to give a charge which asserted this proposition was correct.

The evidence fully warranted the charges given at the request of the solicitor. The sufficiency of the evidence was a question for the jury.

Affirmed.

CRIMINAL LAW — WHO IS A PROSTITUTE. — A woman submitting to indiscriminate sexual intercourse, which she solicits by any act of her own, is a prostitute, no matter whether she receives compensation or not: *State v. Clark*, 78 Iowa, 492. But compare *Commonwealth v. Munson*, 127 Mass. 459, 34 Am. Rep. 411, for what does not constitute lewd and lascivious cohabitation.

EX PARTE HURN.

[92 ALABAMA, 102.]

MANDAMUS TO REVIEW ACTION OF COURT.—*Mandamus* will not lie to compel a judge to hear and determine a motion for the restoration of money to a prisoner, who has been deprived of it by an officer at the time of his arrest, when the money has subsequently been attached in the hands of the officer, and the attachment suit remains undecided, and the motion to restore has been overruled, on the ground that the court has no jurisdiction to entertain it.

ARREST — LIABILITY OF OFFICER FOR SEIZING MONEY ON PERSON OF PRISONER.—An officer, by virtue of his authority to arrest, may also search the prisoner, and seize and remove from his person any money, or anything connected with the offense, or which, in good faith, he has probable cause to believe to be connected therewith, or which may be used as evidence on the trial, without being liable in damages for trespass, although it may result that the money or thing was not, in fact, connected with the offense, or could not be used as evidence at the trial.

ATTACHMENT OF MONEY TAKEN FROM PRISONER.—Money taken from the person of a prisoner at the time of his arrest, by an officer acting in good faith, under the belief, or reasonable and probable ground for the belief, that it is connected with the crime charged, or that it may be useful as evidence at the trial, is subject to attachment or garnishment while in the officer's hands or in court. If the arrest is not made in good faith, or if the money is not seized under probable ground for the belief mentioned, it is not subject to attachment or garnishment; or if the levy is procured by trickery or fraud on the part of the attaching creditor, it is invalid, and such creditor, as well as the officer making the levy with knowledge of the fraud, is liable in damages.

Moore and Finley, for the petitioner.

William L. Martin, attorney-general, for the state.

COLEMAN, J. The petitioner, Hurn, having been arrested on the criminal charge of fraudulently obtaining goods on a credit, was searched by the officer making the arrest, who took from him \$1,124.40 found concealed in his clothing. The prisoner and the money were delivered to the sheriff of the county. An attachment, having been sued out against the defendant, Hurn, was placed in the hands of the sheriff, and by him levied upon the money in his possession. This was followed by a writ of garnishment executed by the coroner of the county upon the sheriff. The attachment and garnishment suits were made returnable to the city court of Montgomery.

The sheriff, as garnishee, filed his answer, setting up the facts and circumstances under which he came in possession of the money, paid the money into court, and prayed that "all proper issues and orders be made up under the direction

of the court, in order that it might be ascertained to whom the money should be paid." The defendant, Hurn, moved the court for an order that the money be restored to him, "upon the grounds that his person had been searched in violation of law, and the money wrongfully, illegally, and violently taken from his person." The suit by attachment and upon which the garnishment issued were still pending and undisposed of at the hearing of the motion.

The court refused to permit moveant to introduce affidavits in support of the facts stated in his petition, and made the following order: "April 14, 1891. Motion overruled, — 1. Because the court is without jurisdiction; 2. Because the facts set out in the motion present an issue to be decided by the jury in the trial of the attachment suit."

From this order overruling the motion, the petitioner applies to this court for a *mandamus*, "upon the grounds that the court refused to hear and determine the motion," etc.

In *Ex parte Redd*, 73 Ala. 549, it was declared that the coercive process of *mandamus* is proper when an inferior court refuses to proceed to judgment in a case in which the law makes it his duty to act. This court compels judgment, but will not control it.

In *Ex parte Schmidt*, 62 Ala. 254, it was held that the writ would lie to compel the execution of ministerial duties in all proper cases, but would not be awarded to order or direct what judgment shall be rendered in any given case, nor can its powers be invoked to correct any error in the final judgment or decree of an inferior court. In such cases there is an adequate remedy by appeal: *Ex parte Echols*, 39 Ala. 700; *Ex parte State Bar Association*, 92 Ala. 113.

In the case of petitioner, the court overruled the motion. The motion has been disposed of by judicial action of the court. Whether the court erred in the order overruling the motion, or in not receiving in evidence the affidavits offered in support of the petition, or whether the reasons assigned by the court for overruling the motion are sufficient, cannot be reviewed on the application for the writ of *mandamus*. Such questions are revisable only by appeal. The remedy by appeal seems to have been resorted to in the cases cited by appellant.

Both parties have argued the case upon its merits, and in view of such intimation from counsel, it may not be improper to consider the real question involved in the case.

It is the law that the levy of an attachment procured by trickery, fraud, or trespass will be held to be invalid, and the officer who makes a levy by such means exposes himself to an action in damages: Waples on Attachment, 180. An officer cannot forcibly take property from the person of a defendant; and if a levy is effected by force, fraud, or violence of any kind, it is generally held void: 1 Wade on Attachment, sec. 130; *Mack v. Parks*, 8 Gray, 517; 69 Am. Dec. 267; *Folmar v. Copeland*, 57 Ala. 588; *Street v. Sinclair*, 71 Ala. 110.

In Drake on Attachment, sec. 506, it is said: "An officer, under criminal process against a person, arrested and took from him money and property found in his possession. The officer was summoned to answer as garnishee of the prisoner. It was held that the officer was exempt from garnishment." The text here stated from Drake on Attachment refers to two decisions from Massachusetts: *Robinson v. Howard*, 7 Cush. 257; and *Morris v. Penniman*, 14 Gray, 220; 74 Am. Dec. 675. An examination of these decisions shows that they were based upon a statute of the state which provided that no person should be adjudged a trustee "by reason of any money in his hands as a public officer, and for which he is accountable to defendant as such officer." In another section of the Massachusetts code it is declared "that money collected by the sheriff by force of legal process in favor of the defendant in the trustee process could not be reached by trustee proceedings." These statutes have been brought forward, and may be found in the Massachusetts code of 1882, page 1055.

The case of *Zurcher v. Magee*, 2 Ala. 253, is to the same effect as the Massachusetts decisions holding that money in the hands of the sheriff, collected by him, to be "in the custody of the law." Since the decision in 2 Alabama was rendered, the law has been changed by statute (Code 1886, sec. 2950), and now money in the hands of the sheriff or other officer may be attached, and as was held in *Pruitt v. Armstrong*, 56 Ala. 310, the law as declared in 2 Alabama no longer prevails.

The law as cited from Drake, *supra*, and the cases cited from Massachusetts being based upon a statute of that state different from the statute of this state, cannot be regarded as authority upon the question.

The case of *Closson v. Morrison*, 47 N. H. 483, 93 Am. Dec. 459, is very much in point. In that case the deputy sheriff, having arrested the plaintiff on a complaint for larceny, searched him,

and took from his person a watch and chain, and money, and on the next day, while this money was in his possession, it was attached by the party who had made the criminal charge, and also by another creditor. The New Hampshire statute provides that "any officer who shall find any implement, article, or thing kept, used, or designed to be used, in violation of law, or in the commission of any offense, in the possession of or belonging to any person arrested, or liable to be arrested, for such offense, or violation of law, shall bring such implement, article, or thing before the justice or court having jurisdiction of the offense, who shall make such order respecting their custody or destruction as justice may require." The court held that a due regard for his own safety on the part of the officer, and also for the public safety, would justify a search and seizure of any deadly weapons he might find upon the prisoner, and hold them until he was discharged, or otherwise properly disposed of; and further held the sheriff might seize any money or other articles of value found upon the prisoner, by means of which, if left in his possession, he might procure his escape, or obtain tools, or implements, or weapons with which to effect his escape. The court further held that the validity of the attachment depended upon the *bona fides* or *mala fides* of the search and seizure of the property; that if this was done in order to effect a levy, it would be invalid, but if done with a due regard to the public safety, and to secure the safety of the prisoner only, then the separation of the property from the person of the defendant was lawful, and it would then be subject to attachment as property not found upon the person. Whether it was *bona fide* or not was a question for the jury under all the evidence.

In the case of *Spalding v. Preston*, 21 Vt. 9, 50 Am. Dec. 68, the sheriff arrested one Russell on a charge of counterfeiting, and took from his person a lot of German silver, and held it under the order of the state's attorney. He was sued by one Preston, who claimed to be the owner of the property by purchase. The court, Redfield, J., held that the sheriff was not liable for a trespass. Much is said in this opinion not applicable to the case at bar, and it is cited as an authority, as to the right and duty of the sheriff to search and take from a prisoner property found on his person.

In Waples on Attachment, 181, the principle is laid down, that if the plaintiff in attachment is not an instigator or co-worker with the officer in obtaining an unauthorized and

illegal levy, he ought not to lose the benefit of an attachment, and that the circumstances of each particular case must determine whether the official wrong-doing was such as to invalidate the levy.

In the case of *Gile v. Devens*, 11 Cush. 61, 62, the court recognized the distinction in cases where unlawful means were used for the purpose of seizing the property, and the seizure was effected by those means, and in cases where the levy was in no way connected with or effected through the unlawful act of the officer. In *Hitchcock v. Holmes*, 43 Conn. 528, the court recognized the rule that a levy could not be effected by a trespass, but held that an officer with a writ of attachment in his possession, who was invited by a servant, not knowing the purpose of the officer in calling, to enter a dwelling-house, was lawfully in, and authorized to make a levy upon such household goods as were liable to satisfy the attachment.

In the case of *Pomroy v. Parmlee*, 9 Iowa, 140, 74 Am. Dec. 328, the facts as stated in the opinion were as follows: Plaintiffs sued out a warrant in Scott County upon a criminal charge against the defendant, and at or about the same time a writ of attachment. The sheriff, with E. S. Pomroy and a deputy, followed the defendant, and overtook him in Poweshiek County, and there arrested him, and took possession and control of a trunk of the defendant, and against the objection of the defendant carried the defendant and the trunk back to Scott County. After getting back to Scott County, where the sheriff was authorized to levy the attachment, it was levied upon \$1,089 of money found in the trunk. The court held that it was settled that a valid seizure, service, or execution cannot be obtained through means rendered unlawful by fraud or violence; that "under the shadow of the criminal process, the name and pretense of a civil writ was used to bring the property to a place where the latter might be levied upon it." It is clear that the court concluded from the facts in this case that the criminal process was used for the purpose of effecting a levy, and in accordance with the general principle that a levy effected by fraud or violence will not be upheld, declared that the attachment, if thus obtained, was illegal.

In the case of *Reifsnyder v. Lee*, 44 Iowa, 101, 24 Am. Rep. 733, the facts were, that Lee had stolen five head of cattle, and sold them to the plaintiff for \$162. The owner recovered the cattle, and plaintiff had Lee arrested for the larceny, and

the officer making the arrest took from his person both money and a watch. Plaintiff then sued Lee, and had the officer who held possession of the property garnished. The defendant moved the court to discharge the garnishee and dissolve the attachment, on the ground that the money and watch were unlawfully and forcibly taken from him. The trial court granted the motion; and on appeal the supreme court held that the object of the pursuit and capture of Lee was, not to obtain possession of the money and watch in order to subject it to legal process, but for the purpose of bringing him to punishment for his crime. The conclusion of the court was, that the money and watch were lawfully taken from the possession of Lee, and being rightfully in the possession of the officer, was subject to the process of garnishment. The court declared in this case it was usual and proper for officers, upon the arrest of felons, to subject them to search, and take from them articles found upon their persons, and suggested, as an additional thought, "that there was ample ground for holding that the money taken from Lee was the money received from the sale of the cattle."

The principles of law declared in this case are directly applicable to the facts of the present case, but this decision seems to have been materially qualified by a later decision in the same state, in the case of *Commercial Bank v. McLeod*, 65 Iowa, 665; 54 Am. Rep. 36. The code of Iowa, sec. 4212, provides: "He who makes an arrest may take from the person all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken, to be disposed of according to law." In construing this section of the code, the court held that the officer making the arrest was not precluded thereby from taking from the person of the prisoner other property than "offensive weapons," but that he might search him and take from him all property which might be used by the prisoner in effecting his escape. The court held, however, in this latter case (*Commercial Bank v. McLeod*, 65 Iowa, 665; 54 Am. Rep. 36), that if the money and property found on the prisoner had no connection with the arrest or the crime charged, and was not to be used as evidence in the prosecution, "the personal possession of the sheriff should be regarded as the personal possession of the prisoner, and the money and property should be no more liable to attachment than if it was in the prisoner's pocket"; and on an application for rehearing, the court re-

affirmed that "the possession of the officer was the possession of the defendant"; citing in support of the principle 1 Archbold's Crim. Pl. 34, 35; Wharton's Crim. Pl., sec. 61; 1 Bishop's Crim. Proc., secs. 210-212; and *Patterson v. Pratt*, 19 Iowa, 358. We have been unable to find the reference in 1 Archbold's Criminal Pleading sustaining the proposition.

In Wharton's Criminal Pleading, sec. 60, it is declared: "Those arresting a defendant are bound to take from his person any articles which may be of use as proof in the trial of the offense with which the defendant is charged. These articles are properly to be deposited with the committing magistrate, to be retained by him, with the other evidence in the cause, until returned to the prosecuting officers of the state. They should carefully be preserved for the purposes of the trial, and after its close be returned to the person whose property they lawfully are. Sec. 61. The right of the arresting officer to remove money from the defendant's person is limited to those cases in which the money is connected with the offense with which the defendant is charged. Any wider license would be a violation of his personal rights. When money is taken in violation of this rule, the court will order its restoration to the defendant. That where property is identified as stolen, or is in any way valuable as proof, it may be sequestered, is plain."

Bishop's Criminal Procedure, secs. 210, 211, is to the same effect; and in section 212 it is stated that the officer "holds all such property, whether money or goods, subject to the order of the court, and in proper circumstances he will be directed to restore it in whole or in part to the prisoner."

Both these authorities, it will be seen, limit the right to take money from the prisoner in cases in which the money is in some way connected with the offense charged, or to be used as evidence on the prosecution. Whether the officer would be held guilty of a trespass, if on the trial it appeared that the officer was mistaken in believing that the money was connected with the offense or material as evidence, is not stated; or whether the money while in the possession of the officer was subject to attachment at the suit of creditors is not discussed or declared. The common-law rule declared by Wharton and Bishop, *supra*, seems to conflict with the state decisions which we have quoted, in so far as they declare it to be the duty of the arresting officer to search and take from the per-

son of the prisoner money or other property which might be available in effecting his escape.

It is stated by Mr. Wharton, and sustained by his references, that at common law, "if the property is identified as stolen, or is in any way valuable as proof, it may be sequestered, is nevertheless plain." If, under this rule, the property is sequestered, or deposited in court, or held by the officer, to be used as proof on the trial, and while thus held a creditor attaches it, what are the rights of the attaching creditor? At common law, and perhaps without statute, the money or property would be *in gremio legis*, not subject to attachment, and entirely under the control of the court. After the prosecution is ended, at common law the court could and ought to direct "that it be restored in whole or in part to the prisoner, according to the circumstances." In many states property thus held was regarded *in gremio legis*, and therefore not subject to attachment: See *Zurcher v. Magee*, 2 Ala. 253, and authorities cited. We understand this to be the reason and extent of the rule as declared by Mr. Bishop and Mr. Wharton.

The facts of the case of *Patterson v. Pratt*, 19 Iowa, 358, are as follows: One Dunn, having lost two hundred dollars, sued out a search-warrant against Pratt. Under this warrant Pratt was arrested, and \$485.12 found on his person, which was taken from him and delivered to the magistrate. While the money was in the hands of the justice of the peace, the plaintiff, Patterson, had it levied on by the sheriff, to satisfy an execution in his favor, and also summoned the justice to answer as garnishee. The garnishee paid the money to the clerk of the court. The statute of Iowa in regard to garnishing money or a fund in the hands of an officer or in court is very similar to section 2950 of this state. The court, Dillon, J., held: "The appellant argues that the statute contemplates a fund which has come into court legitimately by civil process, or by consent of the execution debtor. In our opinion, a fund may properly find its way into court without the consent or volition of the party from whom it was obtained. . . . Persons may not unwarrantably make use of the machinery of criminal law to accomplish private ends. . . . But we see no evidence of the abuse of the law, in the case at bar, by any party, much less by the appellee. . . . It is not shown that this was a scheme between Dunn and appellee to get hold of the money of the appellant. The charge against Pratt is not shown to have been false or fabricated." After

distinctly recognizing the principle declared in *Usley v. Nichols*, 12 Pick. 270, 22 Am. Dec. 425, and other authorities, that "no lawful thing procured upon a wrongful act can be supported," held that the fund was lawfully in court, and subject to garnishment.

Upon principle, property subject to the payment of a debt may be levied upon by the proper officer, if the levy can be effected without trickery or fraud, or a trespass calculated to provoke a breach of the peace: *Barnett v. Bass*, 10 Ala. 954, and authorities *supra*. The garnishment in this case was regularly executed by the coroner upon the sheriff, who had possession of the money. There is no evidence to show that the defendant was arrested for the purpose of obtaining a levy, or that the criminal charge against him was false or fabricated. The important question then is, Was the sheriff authorized to search the defendant and take from his person the money, either for the purpose of using it as evidence on the criminal prosecution, or to prevent the prisoner from using the money to effect his escape?

Our statute (Code, sec. 4745) provides: "When a person charged with a felony is supposed by the magistrate before whom he is brought to have upon his person a dangerous weapon, or anything which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and such weapon or other thing be retained, subject to the order of court in which the defendant may be tried."

Section 4212 of the code of Iowa provides that "he who makes the arrest may take from the person all offensive weapons which he may have on his person." It was held in the latter state that this section did not preclude the sheriff from taking from his person money or other property which might be used in effecting an escape.

The supreme court of the state of New Hampshire, construing a somewhat similar statute, we have seen, declared the same rule; and the duty and right of the sheriff in this respect has been recognized in other states.

The constitution of the state of Alabama, art. 1, sec. 6, provides "that the people shall be secured in their persons, houses, papers, and possessions from unreasonable seizures or searches; and that no warrant shall issue to search any place, or to seize any person or thing, without probable cause, supported by oath or affirmation." In commenting on article

4 of the constitution of the United States, which prohibits unreasonable searches and seizures, in the case of *Boyd v. United States*, 116 U. S. 616, Mr. Justice Bradley, delivering the opinion, quoted with approbation from Lord Camden as follows: "By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot on my ground without my license, but he is liable to an action, though the damage be nothing. If he admits the fact, he is bound to show by way of justification that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass." These are the principles which protect every citizen of this government in the enjoyment of his personal liberty, his home, and his property, and no other "can abide the pure atmosphere of a government of political liberty and personal freedom." This court, in *Chastang v. State*, 83 Ala. 30, referring to the opinion of Justice Bradley, declared: "We indorse and approve everything said therein." The statute law provides for the issuance of search-warrants, but specifies on what grounds they are to be issued, and only on probable cause supported by affidavit, naming the person and particularly describing the property and place to be searched: Code, secs. 4727-4729. The search and seizure in the present case was not made under these statutory provisions.

Section 4745 of the code we have quoted above, and which provides that when a person is charged with a felony, and is supposed to have a dangerous weapon, or anything which may be used as evidence of the commission of the offense, he may be searched, and such weapon or thing may be seized and retained, subject to the order of the court in which the defendant is to be tried. The question as to the dangerous weapon does not arise in this case. That part of the statute which authorizes the seizure and retention of "anything which may be used as evidence" on the prosecution is a mere statutory enactment of the common law. At common law, the arresting officer had the right to remove money from the

defendant's person, but this right was limited to cases in which the money was connected with the offense, or to be used as evidence: See Wharton and Bishop, *supra*, and the cases cited in support of the text.

We are aware of the responsibility of sheriffs for the safety of prisoners, and their liability for escapes suffered by them or their deputies; but we can find no warrant, either in the common law or statute, for taking money from the person of the prisoner, unless it is connected with the offense charged, or to be used as evidence on his trial. If this right exists in the officer, as an absolute right to prevent escapes, he could, upon the arrest of a person charged with a trivial misdemeanor or disorderly conduct, strip him of all his personal effects. It is no answer to say the officer would not do it. The question is, Has he the right, by virtue of his authority to arrest, also to search and seize, except in cases authorized by the common law or by statute? "It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

After a careful examination of the constitution, prohibiting unreasonable searches and seizures, the common law, the statutes and authorities, we hold that it is the duty of an officer having no other authority than the right to make the arrest to search the party arrested, and seize and remove from him any dangerous weapon found on his person, and he may also seize any money or anything connected with the offense, or which may be used as evidence against him on the prosecution, and retain the money or thing until turned over to the state's attorney, or paid into the court to abide the result of the trial; that an officer acting in good faith, in the execution of this duty, and proceeding upon probable grounds for believing that the money or thing is connected with the offense charged, or may be used as evidence on the trial, may search and take from the defendant arrested by him on a criminal charge money found on his person, and he will not be liable in damages for a trespass, although it may turn out that the money or thing was not in fact connected with the offense, or could not be used as evidence of the commission of the offense; that the money or thing seized by the officer under the foregoing limitations, during the time it is in his hands, or if paid into court, is not in the possession of the defendant, but it is thereby sequestered and subject to attachment or garnishment under section 2950 of the code; that if the arrest was made

not in good faith, or if the money or thing is seized without probable grounds for believing that it is connected with the offense, or useful as evidence on the trial, the levy made under such circumstances is invalid; or if procured by trickery or fraud on the part of the attaching creditor, the levy will be held invalid; and the officer making the levy, if he knows of the fraud, and person procuring it to be done by such means and for such purposes, will be liable to a suit for damages.

We believe these principles consistent with the personal liberty of the person arrested, as secured to him by the constitution of the state, and concede to the officer all the authority given to him by the common or statute law. We know of no law which will prevent a creditor from having the property of his debtor levied upon to satisfy his debt, when it can be done without committing a trespass, or by fraud or violence. At common law, the property in the hands of an officer was regarded *in gremio legis*, and not subject to process; but by statute it is subject to legal process.

The return of the court to the rule *nisi* shows that the prosecution and attachment suits against the moveant are undecided, and are pending in court. Whether, under the principles declared in the foregoing opinion, the money is subject to the attachment and garnishment depends upon the evidence to be introduced on the trial, and the garnishing creditor has a right to his day in court, and to have a jury pass upon the facts.

In any view we take of the case, the application for *mandamus* must be denied.

Mandamus denied.

MANDAMUS, WHEN WILL NOT LIE. — **MANDAMUS** will not lie to compel a court to render any particular judgment, nor to set aside a decision already made: *Weeden v. Town Council*, 9 R. I. 128; 98 Am. Dec. 373, and note; and this rule applies to a motion which has been denied by the court: *People v. Pratt*, 28 Cal. 166; 87 Am. Dec. 110.

ARREST. — **RIGHT OF OFFICER MAKING AN ARREST** to search his prisoner, and take from him any money or valuables found upon his person: See *Closson v. Morrison*, 47 N. H. 482; 93 Am. Dec. 459.

ATTACHMENT — PROPERTY TAKEN FROM A PRISONER. — The attachment of property taken by an officer from the person of a person arrested for the commission of a crime is void, if the officer took the property simply for the purpose of getting possession of it, so that he might attach it; but if he took it in good faith, to secure the safe-keeping of the prisoner, an attachment of it is valid: *Closson v. Morrison*, 47 N. H. 482; 93 Am. Dec. 459. In *Reifsnyder v. Lee*, 44 Iowa, 101, 24 Am. Rep. 733, it is decided that upon the arrest of a person for larceny money and valuables taken from him by

the officer can be garnished or attached while in the officer's hands, in a civil action against the prisoner. We think the court erred in the principal case in holding that property taken from a prisoner is, while in the custody of the arresting officer, or of the police department, subject to seizure or garnishment under attachment or execution. "We should fear that any other construction would lead to a gross abuse of criminal process": *Robinson v. Howard*, 7 Cush. 257; *Freeman on Executions*, sec. 130 a; *Morris v. Penniman*, 14 Gray, 220; 74 Am. Dec. 675.

LOUISVILLE AND NASHVILLE R. R. Co. v. JOHNSON.

[92 ALABAMA, 204.]

RAILROADS — INTOXICATED PASSENGER, LIABILITY FOR EXPULSION OF, WHEN SUBSEQUENTLY INJURED. — An intoxicated passenger on a railroad train, by refusing to pay fare when it is rightfully demanded, becoming boisterous and using profane and obscene language, renders himself an intruder or trespasser, and may be expelled without unnecessary force, due care being used not to expel him at such time, place, or under such circumstances that serious injury will naturally or probably result; and when such passenger is so expelled, he cannot recover for a subsequent injury to which he contributed by placing himself in a position of peril while so intoxicated.

RAILROADS — INTOXICATION OF PASSENGER AS CONTRIBUTORY NEGLIGENCE. — When an intoxicated passenger, not so drunk as to be stupetied or unable to travel, is rightfully ejected from a railroad train at six o'clock on a dark evening, one mile from his home, in a locality with which he is familiar, and is subsequently injured during the night by another passing train, he cannot recover against the railroad company which ejected him. His expulsion in such case cannot be regarded as the natural and proximate cause of the injury, or as connected with it, except as he himself connected it by his voluntary intoxication.

Jones and Falkner, for the appellant.

W. T. L. Cofer, for the appellee.

CLOPTON, J. Appellee, as administratrix, sues to recover damages for the death of A. W. Johnson, alleged to have been caused by the culpable negligence of the employees of defendant. Plaintiff's intestate having taken passage on a train of defendant, and having willfully and persistently refused to pay his fare when asked, becoming boisterous and using profane and very obscene language, clearly shown by the evidence, it became the duty of the conductor to protect defendant against such intrusion, and the passengers against insult and annoyance. The right of the conductor to put him off the train, under such circumstances, does not admit of serious question. By refusing to pay his fare when rightfully demanded, and by his gross misconduct, deceased forfeited all

right to remain in the car, and assumed the position of an intruder. The conductor was not required to have consideration for his convenience, and was authorized to stop the train and put him off at any point on the railroad, having reasonable regard for his personal safety. The company owed him no duty other than the duty it owes to any trespasser, — not to inflict intentional, reckless, or wanton injury. In exercising the right of expulsion, unnecessary force must not be used, nor must it be exercised at such time, place, and under such circumstances that serious injury will probably and naturally result; for if it ensues, this is the equivalent of intentional, reckless, or wanton injury. Subject to these limitations and restrictions, the time, place, and circumstances are left in the discretion and judgment of the conductor: *Wyman v. Northern Pacific R. R. Co.*, 34 Minn. 210; *Atchison etc. R. R. Co. v. Gants*, 38 Kan. 608; 5 Am. St. Rep. 780; *Great Western R'y Co. v. Miller*, 19 Mich. 305; *McClure v. Philadelphia and Baltimore R. R. Co.*, 34 Md. 532; 6 Am. Rep. 345; *Hutchinson on Carriers*, sec. 590; *Rorer on Railroads*, 960; *Memphis etc. R. R. Co. v. Womack*, 84 Ala. 149; *Louisville etc. R. R. Co. v. Black*, 89 Ala. 313. No right of recovery is or can be claimed under the original complaint, which proceeds on the theory that plaintiff's intestate was a passenger. The amended complaint, by the statement that his fare was demanded, and that he neglected or refused to pay it, impliedly conceded the consequent right to remove him from the train, and bases the liability of defendant on the averments that the conductor put him off at a time and place, and under circumstances seriously endangering his safety, and exposing him to imminent peril of life or limb from passing trains, and that he was run over and killed by one of defendant's trains.

The time was about six o'clock in the evening, dark and raining. The place, at or near the entrance to a cut from two hundred to two hundred and fifty yards long, about one mile from Wilhite, a station which the train had just left, also from the home of the deceased. On the right is a mountain or high hill, and on the left a creek about twelve feet below and thirty or more feet from the railroad, but sufficient space on each side of the road to enable a person to avoid injury by passing trains. Between the cut and Wilhite are a trestle and two stock-gaps. Deceased was familiar with the locality and the cut. He was intoxicated, but not so drunk as to be unconscious or stupefied; had the use of his mental and physical

faculties. There was nothing in his manner to indicate to the conductor that he could not or would not avoid the danger of a passing train. A train was due about thirty minutes thereafter, and two others passed during the night. His body was discovered the next morning on the opposite side of the track, a short distance from where he was put off, badly mangled. He was not injured while being ejected, or by the train from which he was removed, or by exposure to any perils incident or peculiar to the time or place, disconnected from the passing of other trains. From the position and condition of his body, it may be assumed that he was run over and killed by another train, and this the amended complaint avers. Under its averments and on the evidence, the material inquiry is, whether putting him off at such time and place was the proximate cause of his death, or his own negligence or other intervening agency.

Drunkenness has been styled a self-imposed disability, and men make themselves drunk at their peril. It does not excuse the omission to use the same care and prudence which is exacted of a sober man under the same circumstances. "The fact of the intoxication of the injured person, at the time of the injury, will not only not relieve from the consequences of his contributory negligence, but also, if his intoxicated state contributed to the happening of the injury, will be admissible in evidence as proof of contributory negligence": 2 Am. & Eng. Ency. of Law, 751; *Columbus etc. R'y Co. v. Wood*, 86 Ala. 164; Beach on Contributory Negligence, sec. 146. It appearing that plaintiff's intestate was not so drunk as to be unconscious of the peril attending the passing of trains, or unable to take care of himself, his drunkenness is not only not excusatory, but tends to show that he contributed to his own injury by placing himself in the position of imminent danger in which he was found. Had he even remained on the side of the road where he was left, he would not have been injured.

The degree of intoxication, as also the other facts and circumstances, plainly distinguish this case from the case of *Louisville etc. R. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186, which is cited and relied on by appellee's counsel. In that case, the weather was intensely cold, several degrees below zero, the ground covered with snow eight to ten inches deep, and the person put off stupidly drunk, unable to take care of himself or to travel. The probability was, that he

would remain wherever put, and the natural consequence that he would freeze, which in fact produced his injuries. Putting him off under such circumstances was considered gross negligence, and the proximate cause of his injuries. It is said in the opinion, that the force, if not unnecessary, was used "under circumstances and at a time when the consequences ordinarily would be as injurious as when, in an attempt to remove a trespasser from his dwelling-house, the owner should shove him from an upper story, or lead him into a pitfall or well, or when a person is pushed off a fast moving train,"—reckless or wanton.

Railway Co. v. Valleley, 32 Ohio St. 345, 30 Am. Rep. 601, is parallel. The party, who was drunk, but not stupefied or unable to travel, was put off about eight or nine o'clock in the evening, and was found the next morning about one third of a mile from where he was put off, in a dying condition, and died a few moments after he was taken up. Being found near the track badly bruised and mangled, it was assumed that he was run over and killed by another of the company's trains. Ashburn, J., said: "But if the propriety of the expulsion were doubtful, either because deceased's conduct did not justify it, or because his condition rendered it unsafe and dangerous in its consequences, still we must find that the death was the natural and proximate result of the expulsion before defendants can be made liable. How can this be said in the present case? Admit that the vicinity of a railroad track is dangerous to passers by; admit that putting off, as was done, was placing him in circumstances of danger,—they were no more dangerous to him than they were to every man whose business or pleasure takes him in the neighborhood of railroads. There was no unusual or extraordinary circumstance of danger in the whole transaction if the man was able to take care of himself, and this he was. The mere putting him off, therefore, was in no way connected with his death, except as he himself connected it by reason of his intoxication, and for this he alone is responsible. The expulsion is not in any way the occasion of the catastrophe, either as a proximate or other cause, unless it is in some way attached to or linked with the drunkenness. If this is the state of the case, he must have been so drunk at the time he was struck as to be unable to avoid the accident, which shows the intoxication to have been the proximate cause; and whether it be the proximate cause, or a cause for which alone he is responsible, in either

case the responsibility cannot be fastened upon defendant." These cases, above referred to, draw the distinction as to the circumstances under which putting an intoxicated person off the train, and when his drunkenness, will be considered the proximate cause of his injury.

Plaintiff's intestate being boisterous and unruly, using profane and vulgar language, making himself obnoxious to the other passengers, it was the duty of the conductor not to hesitate, but act promptly, using due discretion and judgment. Not being unconscious or in a stupor, and being familiar with the cut and road, he was bound to know that other trains were expected, and that it would be dangerous to be or remain on the track. If the danger to which he was exposed consisted in his going upon the track, no place could have been found on the side of the road where he would not be exposed to the same danger. Left where passing trains would not injure him without some intervening agency, if he afterwards wandered on the track and placed himself in a position of peril, it was his own carelessness resulting from his unfortunate condition, for which defendants are not responsible. His expulsion from the train cannot, under the evidence, be regarded as the natural and proximate cause of his death, or as connected with it, except as he himself connected it by his voluntary intoxication: *McClelland v. Louisville etc. R'y Co.*, 94 Ind. 276.

The court should have given the affirmative charge requested by defendant.

Reversed and remanded.

Intoxication as Contributory Negligence.*

INTOXICATION AS CONTRIBUTORY NEGLIGENCE — *Intoxication Which did not Contribute to the Injury.* — In actions to recover for personal injury alleged to have been inflicted in consequence of defendant's negligence, the fact that the plaintiff was intoxicated at the time the injury was received does not of itself constitute such contributory negligence as will defeat recovery: *Stuart v. Inhabitants of Machiasport*, 48 Me. 477; *Cramer v. City of Burlington*, 42 Iowa, 315; *Thorp v. Town of Brookfield*, 36 Conn. 320; *Houston etc. R'y Co. v. Reason*, 61 Tex. 613; *Robinson v. Pioche*, 5 Cal. 461. Intoxication, by itself, will not prevent recovery without proof that it actually contributed to the injury: *Houston etc. R'y Co. v. Reason*, 61 Tex. 613. In other words, drunkenness is not a defense by way of contributory negligence,

*REFERENCE TO MONOGRAPHIC NOTES.

Intoxication as a defense of one accused of crime: 40 Am. Rep. 560-570.

Intoxication of contractor at time of executing a contract: 21 Am. Rep. 29-34.

Intoxication, civil damage laws authorizing recovery of damages from persons selling liquors to others, who become intoxicated thereon: 25 Am. Rep. 362-369; 48 Am. Dec. 625-632.

unless it was the proximate cause of the injury received: *Davis v. Oregon etc. R. R. Co.*, 8 Or. 172.

Intoxication does not Excuse Negligence. — Voluntary intoxication is no excuse or justification for the commission of an act of negligence on the part of the plaintiff: *Missouri Pac. R'y Co. v. Evans*, 71 Tex. 361. The fact of his intoxication will not relieve the plaintiff of that exercise of due care for his personal safety that would reasonably be expected to be exercised by a sober person under the same circumstances: *St. Louis etc. R'y Co. v. Wilkerson*, 46 Ark. 513-522. In actions to recover for personal injuries alleged to have been caused by negligence on the part of the defendant, the plaintiff must show that the injuries he received were occasioned exclusively by the negligence of the defendant. Hence if it is found that plaintiff has himself been guilty of any negligence or want of ordinary care that has directly contributed to cause the accident, he has no cause of action for the injury received, though the defendant may likewise have been guilty of negligence; and the rule is the same whether the plaintiff was drunk or sober at the time of the accident: *Kean v. Baltimore etc. R. R. Co.*, 61 Md. 154. If a traveler on the highway, by reason of his voluntary intoxication, exposes himself to danger, and receives injuries which he could, and by the exercise of ordinary prudence would, have avoided if sober, he is guilty of contributory negligence, and cannot recover: *Wood v. Board of Commissioners*, 128 Ind. 289. Or if the party injured becomes drunk under such circumstances that any reasonably prudent man could foresee that he was putting himself in such a position of peril that that which resulted might probably happen, then his intoxication is a defense by way of contributory negligence: *Davis v. Oregon etc. R. R. Co.*, 8 Or. 172.

Contributory negligence caused by the inebriation of the party injured will exonerate the party inflicting the injury from responsibility, especially when there is no negligence on his part: *Weeks v. New Orleans etc. R. R. Co.*, 32 La. Ann. 615. A man cannot, by his voluntary intoxication, place himself in a condition whereby he loses such control of his brain and muscles as a man of ordinary prudence and caution, in the full possession of his faculties, would exercise, and thereby contribute to an injury to himself, and then require one ignorant of his condition to recompense him therefor: *Strand v. Chicago etc. R'y Co.*, 67 Mich. 380. This rule is illustrated by numerous cases. Thus in *Toledo etc. R'y Co. v. Riley*, 47 Ill. 514, the plaintiff was injured in consequence of being struck by a train on a railroad track, while returning home in the afternoon. The facts, as referred to by the court in its opinion, were, that, as appeared by his own statement, he had been drinking somewhat freely of whisky, and the testimony of other witnesses showed that he was in such a condition that he paid no attention to the shouting of two persons only ten or twelve steps from him, just before he crossed the track. The evidence further showed that the railroad track was in full view as he approached it from such a distance as to make it evident "that the plaintiff, by the exercise of less than ordinary prudence, might have discovered and avoided the approaching train. He did not do this, but either in a state of partial stupefaction from drink, or acting with a reckless temerity utterly inexcusable, he undertakes to cross with the train in full view, if he had but looked along the track, thus wantonly imperiling not only his own life, but that of the passengers on the train. While the highway traveler cannot be required to leave his vehicle, or adopt any other unusual means to discover an approaching train, he cannot be per-

mitted to voluntarily close his eyes to danger, or to rush into it with utter recklessness, and then claim compensation for injury."

It is the duty of persons about to cross a railroad track, whether they are drunk or sober, to look about them and see whether there is danger, and not to go recklessly upon the road, but to take proper precautions to avoid accidents, and if any one, because of his voluntary intoxication, thus rushes into danger which by ordinary care he could have seen and avoided, he is guilty of contributory negligence, and cannot recover for any injury he may receive: *Chicago etc. R. R. Co. v. Bell*, 70 Ill. 102. So in *Yarnell v. St. Louis etc. R'y Co.*, 75 Mo. 575, 585, the court said: "The testimony further shows that the deceased, on the evening of the accident, and just before most of the regular trains for that evening were due and expected, in a state of intoxication, and staggering, started up the railroad track, and that at the place where his dead body was found, about half-past nine o'clock that night, the railroad was both straight and level for at least a quarter of a mile both ways, and that there was nothing to prevent deceased from seeing or hearing an approaching train, or to prevent him from getting off the track in time to avoid injury, if he had been sober, or awake, or in the exercise of ordinary care for his personal safety. Under such circumstances, the conclusion is almost irresistible, that the deceased, from extreme drunkenness, had either fallen or laid down on the track in a state of stupor or drowsiness, and was thus run over and killed by some one of the passing trains, without having been seen in the darkness by those in charge of the train. Under such circumstances, it is difficult to see how the defendant can be charged with negligence, whilst it is quite evident that the deceased was manifestly guilty of such contributory negligence as will prevent a recovery."

In *Little Rock etc. R'y Co. v. Pankhurst*, 36 Ark. 371, it appeared that the party injured was walking on the railroad track, on which was a well-worn path, and that he was drunk and staggering, that when within about four miles of his home, and about dark, he fell and lay upon the track, where a passing construction train ran over and killed him about eight o'clock in the evening, and it was held that though the defendant might have been guilty of negligence in not having a light on the tender and a lookout in front, yet the deceased's own negligence in being voluntarily upon the track, and from intoxication unable to get out of the way of the train, was the proximate cause of his death, and prevented a recovery. In the subsequent case of *St. Louis etc. R'y Co. v. Wilkerson*, 46 Ark. 513-522, the court said: "'Drunkenness will never excuse one for a failure to exercise the measure of care and prudence which is due from a sober man under the same circumstances. Men must be content, especially when they are trespassers, to enjoy the pleasures of intoxication *cum periculis*. When they make themselves drunk, and in that condition wander upon a railroad track and sustain an injury, they will not be heard to plead their intoxication as an answer to the charge of negligence,' or as a reason why the railroad company should be held responsible to them for damages." So in *Southwestern R. R. v. Hankerson*, 61 Ga. 114, the rule is laid down, that where one, from being voluntarily drunk, falls or lies down in a state of insensibility on a railroad track, so that he is injured by a passing train, he cannot recover for the injury received, though the railroad company may also have been guilty of contributory negligence. Again, in *McClellan v. Louisville etc. R'y Co.*, 94 Ind. 276, where a drunken passenger on a railroad train, owing solely to his intoxicated condition, was lawfully removed from the train by the employees thereon, and placed a short distance from the track, to which he subsequently wandered, and where he was run

over and killed by another train, at a point where those in charge thereof did not and could not see him in time to prevent the accident, it was held that the expulsion was not the proximate cause of the accident, but that the intoxicated passenger's contributory negligence in wandering upon the track was such cause, and that the railroad company was not liable for his death, nor chargeable with notice of his condition or whereabouts. The same rule was applied to like facts in *Railway Co. v. Valleley*, 32 Ohio St. 345; 30 Am. Rep. 601.

In *Virginia etc. R. R. Co. v. Boswell*, 82 Va. 932, the railroad track-walker found a man lying on the track asleep, and aroused him and informed him of his danger from an approaching train. He was intoxicated, but this fact was unknown to the track-walker, and as the man when warned raised himself on his elbow and signified his comprehension of the situation, without appearing to be helpless or disabled from any cause, he was left on the track, where a train subsequently passed over and killed him, and it was held that the fact of his being thus left upon the track was not negligence proximately causing his death, but that his intoxication so contributed to the accident as to bar any recovery for the injury. So in *Herring v. Wilmington etc. R. R. Co.*, 10 Ired. 402, 51 Am. Dec. 395, where two slaves became intoxicated, laid down upon the railroad track and went to sleep at a point where they could have been seen by the engineer at a distance of from two hundred yards to half a mile, and were killed by a passing train, it was decided that their being upon the track in a condition of helpless intoxication was such contributory negligence as would prevent a recovery, in the absence of wanton negligence in the railroad company. To the same effect, *Button v. Hudson River R. R. Co.*, 18 N. Y. 248-253.

Reckless Negligence toward Intoxicated Persons. — In *Louisville etc. R. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186, it appeared that a passenger, in a helpless state of intoxication, was put off the train away from a station on a freezing cold night, in consequence of which he was exposed to the action of the elements, and his body partially frozen. The railroad company was held liable. The decision in this case, however, is placed upon the ground that, notwithstanding the passenger's intoxication, the act of the railroad company in thus ejecting him in such weather was gross and wanton negligence, for which he could recover, notwithstanding negligence on his part. Where an intoxicated passenger, not exercising ordinary care, is thrown from the open door of a caboose on a railroad train moving at a rate of thirty-five miles an hour around short curves, his intoxication will not excuse his want of exercise of due care, but will constitute contributory negligence defeating a recovery: *Norfolk etc. R. R. Co. v. Ferguson*, 79 Va. 241. In *Monk v. New Utrecht*, 104 N. Y. 552, the street consisted of a road-bed sixty feet wide, in the center of which was a street-car track, on either side was a sidewalk eleven feet in width, raised a foot above the level of the street, and on either side of the sidewalk was an embankment leading down from the street. Plaintiff, while drunk, was placed in the center of the street and told to follow the car-track home, but he wandered off the street, fell down the embankment, and was injured. It was held that he was chargeable with contributory negligence, and could not recover against the city. In *Cassedy v. Stockbridge*, 21 Vt. 391, the action was brought to recover for an injury alleged to have been caused by the insufficiency of a street. It was shown that plaintiff was intoxicated at the time of the accident, and it was decided that if he was thereby rendered incapable of managing himself and his team with ordinary care and prudence, and his want of such care contributed in the

slightest degree to produce the injury, the plaintiff was not entitled to recover. In an action against a city to recover for an injury caused by a defect in the street, whereby plaintiff was thrown from a wagon, if it is shown that the driver of the wagon was drunk, and by careless driving caused the accident, and that such driver was the plaintiff's husband, and the defect in the street was not such as to be dangerous to a person exercising ordinary care, the plaintiff is not entitled to recover: *City of Rock Island v. Vanlandschoot*, 78 Ill. 485.

Intoxication as Evidence of Negligence.—In actions to recover for personal injury alleged to be the result of negligence on the part of defendant, the fact of the intoxication of the plaintiff at the time of the accident is always admissible in evidence, for the consideration of the jury, as a circumstance to aid them in determining whether or not the plaintiff was exercising due care, and consequently free from contributory negligence: *Thorp v. Brookfield*, 36 Conn. 320; *Cramer v. Burlington*, 42 Iowa, 315; *Hayes v. Forty-second Street etc. R. R. Co.*, 97 N. Y. 259; *Alger v. Lowell*, 3 Allen, 402; *Houston etc. R'y Co. v. Walter*, 56 Tex. 331; *Wynn v. Allard*, 5 Watts & S. 524. It was said in *Houston etc. R'y Co. v. Reason*, 61 Tex. 613-618, that "there is much conflict in the evidence as to whether the appellee was intoxicated at the time he received the injury; but it is unimportant what his condition was in this respect if the injury to him resulted from the negligence of the appellant, unless his own negligence contributed to the injury; and the jury were at liberty, in considering that matter as well as the probability of his statements, to look to his condition at the time, under all the facts in proof, and under the charge of the court as to his confessed drunkenness."

When the person injured was, at the time of the accident, intoxicated in any degree, that fact is proper to be considered by the jury in determining the question of contributory negligence: *Fitzgerald v. Weston*, 52 Wis. 354; and when evidence has been introduced showing plaintiff to have been intoxicated at the time that the injury was received, the presumption in favor of his sobriety is overcome, and the burden of proof is then on him to show that he was not guilty of intoxication, and in the exercise of ordinary care and prudence, to entitle him to recover: *Burns v. Elba*, 32 Wis. 605; *Cramer v. Burlington*, 42 Iowa, 315; *Hubbard v. Mason City*, 60 Iowa, 400.

After the fact of intoxication has been found, it is not necessary that the jury should also find, as a result thereof, that the plaintiff became careless and reckless in regard to his safety, to defeat his recovery. With all the care of which he was capable in that condition, he may have still contributed to his own injury: *Cramer v. Burlington*, 42 Iowa, 315. In a case where the question of mutual negligence is involved, and it appears that the injured party was intoxicated at the time, it is error to instruct the jury that love of life and natural instincts of self-preservation possessed by all persons may be considered in deciding whether or not the injured party exercised ordinary care. The jury should be instructed that if the party injured was drunk they should consider that fact, and determine whether or not it rebutted the presumption of ordinary care: *Illinois etc. R. R. Co. v. Cragin*, 71 Ill. 177. The fact that the party injured had drank a glass of beer, or that his companion, four or five hours before, had drank three or four glasses of ale, is not of itself any evidence of intoxication or resulting want of reasonable care on the part of the injured party: *City of Aurora v. Hillman*, 90 Ill. 61. Proof that plaintiff had been in the habit of using intoxicating liquors prior to the injury is not competent to prove that he was intoxicated

when injured: *Hubbard v. Mason City*, 60 Iowa, 400; *Hampson v. Taylor*, 15 R. I. 83.

Evidence of Intoxication. — To prove plaintiff's intoxication at the time of the accident, a witness may state, from his observation and the exercise of his perceptive faculties, whether plaintiff was or was not intoxicated at that time without being confined to the detail of the combination of circumstances and minute appearances from which he learned the fact, and he may also state whether or not a person had the appearance of being intoxicated, and such statement is merely a statement of fact, and does not call for the opinion of the witness: *City of Aurora v. Hillman*, 90 Ill. 62; *People v. Eastwood*, 14 N. Y. 562. In an action to recover damages for personal injuries caused by defendant's negligent driving, evidence that he was intoxicated is competent, as bearing upon the question of negligence: *Alexander v. Humber*, 86 Ky. 565; and when an action is brought to recover for injury caused by the negligent driving of defendant's servant, the condition of the servant as to being drunk or sober at the time of the accident is a proper subject of inquiry: *Williams v. Edmunds*, 75 Mich. 92.

Contributory Negligence in not Preventing the Intoxication of a Third Person. — A peculiar case is presented in *Reget v. Bell*, 77 Ill. 593, where an action was brought by a wife against a liquor dealer, under the statute, to recover damages for the loss of her husband, whose death was caused by the excessive use of intoxicating liquors sold him by the defendant. On the trial it appeared that the wife knew that her husband had purchased the liquor and was drinking to excess, and had it in her power to prevent him from so drinking by destroying the liquor, while she was not prevented from so doing through fear, but permitted him to use it in such immoderate quantities as to cause his death; and the court held that she must be considered as a willing party to his conduct, instrumental in bringing the loss caused by his death upon herself, and consequently guilty of such contributory negligence as would defeat any recovery by her.

Care Due to Intoxicated Person. — As has been shown, intoxication on the part of the injured party will not excuse the same due care on his part that would be reasonably expected of a sober person under the same circumstances; and on the other hand, the party inflicting an injury on an intoxicated person is bound to exercise the same due and reasonable care towards him as he is bound to use towards a sober person. Thus the fact that a man is intoxicated does not alone deprive him of the right to be upon a railroad car, nor does it free the company from its duty to render him due care. The degree of care due to a drunken passenger is the same as that due to a sober one: *Milliman v. New York Central etc. R. R. Co.*, 66 N. Y. 642; *Straud v. Chicago etc. R'y Co.*, 67 Mich. 380. Where the intoxication contributes to the injury, the party inflicting it is liable only when guilty of gross, willful, and wanton negligence: *Virginia etc. R. R. Co. v. Boswell*, 82 Va. 932-935. The rule is laid down in *Houston etc. R'y Co. v. Symphkins*, 54 Tex. 615, 38 Am. Rep. 632, that one who, while in a helpless state of intoxication, is run over and injured by a passing train, is guilty of contributory negligence, which constitutes a bar to recovery, unless the injury was wantonly and willfully inflicted; and in *Missouri Pacific R'y Co. v. Evans*, 71 Tex. 360-369, the court said: "Following the weight of authority, it would seem the railway company would only be liable for wanton or willful neglect on the part of its employees toward the deceased of the duty of caring for his safety if he was intoxicated, even to the extent of insensibility. It cannot be conceded to one incapable of protecting himself from the voluntary use of intoxicants,

that by entering a train from which he was forbidden, and without the knowledge or consent of the conductor, that thereby he can impose upon the railway company any duty beyond ordinary care to protect him from injury while upon the train, and to leave him in a reasonably safe condition. The appellant insists, and not without reason, that instead of excusing want of proper care, the intoxication was a continuing fact evidencing negligence, if not negligence in itself, without which the injury would not have happened. If, as it seems to be, that voluntary intoxication to the extent of insensibility is chargeable as negligence when contributing to the injury, it would follow that a less degree of or partial intoxication would not excuse or dispense with the duty of self-protection by proper care to avoid danger." Again, in *Little Rock etc. R'y Co. v. Haynes*, 47 Ark. 497-502, it was said: "Now, it is very plain that the proximate cause of the injury was the negligence of the plaintiff in voluntarily walking upon the track, and his inability to get out of the way of the train in consequence of intoxication, or a paroxysm of his disease. The railway company is not responsible, unless its train-men had a clear opportunity, after discovery of the plaintiff's peril, to avoid striking him. Or to state the proposition in a different form, a trespasser on a railroad track cannot recover for running him down, in the absence of willful or reckless conduct on the part of the company or its agents." The court, in passing upon this question in *St. Louis etc. R'y Co. v. Wilkerson*, 46 Ark. 513-523, said: "If the employees of a railroad company in charge of its train see a man walking upon its track at a distance ahead sufficient to enable him to get out of the way before the train reaches him, and are not aware that he is deaf, or insane, or from some other cause insensible of the danger, or unable to get out of the way, they have a right to rely on human experience, and to presume that he will act upon the principles of common sense and the motive of self-preservation common to mankind in general, and will get out of the way, and to go on without checking the speed of the train until they see that he is not likely to get out of the way, when it would become their duty to give extra alarm by bell or whistle, and if that is not heeded, and it becomes apparent that he will not get out of the way, then as a last resort, to check its speed, or stop the train, if possible, in time to avoid disaster. If, however, the man seen upon the track is known to be, or from his appearance gives them good reason to believe that he is, insane or badly intoxicated, or otherwise insensible of danger, or unable to avoid it, they have no right to presume that he will get out of the way, but should act upon the hypothesis that he might not or would not, and should use a proper degree of care to avoid injuring or killing him. Failing in this, the railroad company would be responsible in damages, if by the use of such care, after becoming aware of his negligence, they could have avoided injuring him." In *Denman v. St. Paul etc. R. R. Co.*, 26 Minn. 357, the plaintiff, while intoxicated, laid down upon the railroad track, and while in that condition was run over and injured by a passing train. It was held that his negligence arising from his drunken condition contributed to his injury, and that for this reason he could not recover. The court, in delivering the opinion, said: "There is no evidence tending to show that the plaintiff was seen by any person upon the train, and none tending to show that plaintiff's injuries were willfully, wantonly, or intentionally inflicted. The defendant owed him no duty, except that of exercising due diligence to avoid injuring him after discovering that he was there."

The rule that ordinary care and due diligence for the safety of an intoxicated passenger on a railroad train is all that is required of the company is

recognized in *Louisville etc. R. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186, but in that case a drunken passenger was ejected from a train and left by the side of the track on a night so cold that, owing to his condition and inability to move, portions of his body were frozen, and it was held that to eject him under such circumstances was an act of gross negligence to which his intoxication was no defense. The rule is thus stated, in effect, in that case. The right to eject a passenger because of non-payment of fare must be exercised with proper regard to his physical and mental condition and surrounding circumstances; and that to eject him when he is in such physical or mental condition from intoxication as that serious bodily harm may result therefrom is culpable negligence, for which a recovery may be had, notwithstanding his intoxication. The rule as to the relative degree of care due from each party is well stated in *Kean v. Baltimore etc. R. R. Co.*, 61 Md. 154-167, where it is said, "that though the plaintiff may have been guilty of negligence, and that negligence may in fact have remotely contributed to the production of the accident, yet if the defendant could, in the result, by the exercise of reasonable care and diligence, in view of the circumstances of the case, have avoided the accident, the plaintiff's negligence, being the more remote cause, will not excuse the accident. In this case, therefore, if the plaintiff was in fact drunk, and failed to observe the reasonable precautions to avoid danger to himself while in the act of crossing defendant's road tracks, or while upon the tracks of the road, though improperly there, and under such circumstances to constitute negligence on his part, yet if the defendant's servants in charge of the train, after discovering the perilous situation of the plaintiff, could by the exercise of reasonable care and diligence have avoided the accident, they were bound to do it. If they possessed knowledge of the plaintiff's situation, and failed to make reasonable and proper exertions whereby he could have been saved, the defendant would be liable, though it was by reason of the negligence or drunken condition of the plaintiff that he was found in the situation of danger. In such case their failure to use due care and exertion would constitute negligence which would form the direct and proximate cause of the injury. But, on the other hand, if the plaintiff was on the crossing or at any place on the road tracks of the defendant in such condition as not to be able to take care of himself, or paid no heed to the warnings of the approach of the train, or if from negligence or reckless indifference to the perils of his situation he failed to observe the precautions necessary to his safety, and his situation was not known to those in charge of the train, and while observing a careful lookout was not discovered by them in time, by the use of reasonable care and diligence, to save him from injury, then his own want of care and reckless negligence in putting himself in such place of danger would deprive him of all ground of action against the defendant. And this would be the case though there may have been negligence on the part of the defendant. In such case the negligence would be mutual or concurrent, and that of plaintiff so directly contributing to the production of the accident as to preclude the right of recovery."

In *Robinson v. Pioche*, 5 Cal. 461, it was held that plaintiff's intoxication was no defense in an action to recover for an injury caused by gross negligence in leaving an uncovered hole in a sidewalk in a public street. The court said: "If the defendants were at fault in leaving an uncovered hole in a sidewalk of a public street, the intoxication of the plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street as a sober one, and much more in need of it." This rule would seem to be

in doubt, however, in view of the fact that it was decided in *Alger v. Lowell*, 3 Allen, 402, that a city is not bound to keep its streets safe and convenient for intoxicated persons, and that if the injured party was intoxicated at the time of the accident the presumption would arise that he was negligent, and not in the exercise of reasonable care at the time of the accident, and which presumption he would have to overcome by a preponderance of proof, to be entitled to recover.

GEORGIA PACIFIC RAILWAY COMPANY v. DAVIS.

[92 ALABAMA, 300.]

NEGLIGENCE — SUFFICIENCY OF COMPLAINT. — Where a complaint charges actionable negligence and resulting injury against a railroad company, it is not rendered insufficient by additional defective allegations of the conductor's negligence concurring with that of the company. The latter may be disregarded, and the company still be liable for the injuries suffered through its own negligence.

RAILROADS — NEGLIGENCE. — PROJECTING ROCK in the side of a railroad cut, not touching passing cars, but endangering the safety of brakemen in discharging their duty while ascending and descending ladders on the outside of the cars, is a defect in the roadway, rendering the company liable for resulting injuries to such brakemen, unless their negligence proximately contributed thereto.

RAILROADS — CONTRIBUTORY NEGLIGENCE OF BRAKEMAN. — A brakeman on a railroad train, in the absence of notice, is not chargeable with knowledge of a projecting rock in the roadway, which endangers his safety while in the discharge of his ordinary duties, nor is his ignorance of it contributory negligence on his part in case of injury to him.

RAILROADS — DUTY TO TRAIN-MEN. — RAILROAD TRAIN-MEN HAVE THE RIGHT TO ASSUME the adaptation and sufficiency of the roadway in all respects to a safe discharge of their duties in another and distinct branch of the business, and are not held to a knowledge, which has never in point of fact been imparted to them, of defects and dangerous conditions in the culverts, bridges, tracks, embankments, road-bed, cuts, and tunnels of the railroad company, or of the dangerous nature of adjacent structures erected or permitted by the company.

RAILROADS — ASSUMPTION OF RISKS BY TRAIN-MEN. — It is the duty of a railway company to its train-men to provide a roadway in all respects reasonably safe for the running of its trains and the performance of the functions imposed on them by the exigencies of the service, and they have a right to assume, without inquiry or investigation, that this duty has been discharged. The *onus* of inquiry or investigation is not upon them, but if they know of the unsafe condition of the roadway, and continue in the service after the lapse of a reasonable time for the defect to be remedied or removed, they assume the additional risk, though originally not incident to their employment.

RAILROADS — RULES AS EVIDENCE. — In an action by a railroad brakeman against the company to recover for personal injury caused by its negligence, the rules of the company, not brought to his notice, are not admissible for the purpose of imputing negligence to him because of conduct on his part at variance with that which they prescribe.

RAILROADS — VIOLATION OF RULES BY EMPLOYEES — CONTRIBUTORY NEGLIGENCE. — Where a rule of a railroad company, of which a brakeman is ignorant, is habitually violated by the conductor, who knows of its existence, and the brakeman is injured in necessarily obeying an order from the conductor in violation of the rule, the necessity for which cannot be ascribed to the misconduct of the brakeman, negligence cannot be imputed to him; nor will the fact that he delayed a moment or two in taking necessary precautions before obeying the order constitute contributory negligence on his part, although instantaneous obedience would have prevented the injury.

RAILROADS — VIOLATION OF RULES BY EMPLOYEES — CONTRIBUTORY NEGLIGENCE. — A railroad conductor's assent to a violation of a rule of the company known to a brakeman will not relieve the latter of contributory negligence; if, however, the rule was unknown to him, its violation by him is not contributory negligence in case of injury.

CONTRIBUTORY NEGLIGENCE. — **BURDEN TO PROVE** contributory negligence is in all cases upon the defendant, although plaintiff's evidence sometimes relieves from the necessity of discharging it.

RAILROADS — KNOWLEDGE OF COMPANY AS KNOWLEDGE OF CONDUCTOR. — A railroad conductor in charge of a train is not chargeable with knowledge of defects in the roadway known to the company.

MASTER AND SERVANT — FELLOW-SERVANTS. — All who are servants of a common master, engaged in the same general business, subject to the same general control, and paid out of a common fund, are fellow-servants, without regard to rank or grade, and whether the element of personal control enters into the consideration or not, in respect to all acts done in the common service, unless the duty performed by them is such as properly belongs to the master as such, in which case they take the place of the master, and he is chargeable with their acts as if done by him personally, with all the knowledge which the law imputes to him.

RAILROADS — CONDUCTOR, WHEN VICE-PRINCIPAL. — A railroad conductor in charge of a train is exercising the functions of the master in giving ordinary directions and orders in the management and running of the train, so as to be chargeable with knowledge of every fact in relation thereto which is known, or of which the law imputes knowledge, to the master.

ACTION by T. F. Davis, a brakeman in the employ of the appellant company, to recover damages for personal injuries alleged to have been caused by its negligence in allowing a rock to project in a cut in its roadway. Judgment for the plaintiff, and the railroad company appealed.

James Weatherly, for the appellant.

White and Howze, for the appellee.

MCCLELLAN, J. 1. The objection taken by the demurrer to the first count of the complaint as amended is, that it does not sufficiently specify the defect in defendant's roadway which caused the injury complained of. The averment in this regard is, that "the defendant, by its neglect and want

of care, allowed its roadway to be and become greatly out of repair, unsafe, and dangerous, . . . and by reason thereof the plaintiff, while in said employ [as a brakeman], and in the performance of his duties as such brakeman, was violently struck against a projecting rock," and thereby suffered the injuries on account of which he sues. It would require a good deal of ingenuity to draw from these facts any other conclusion, or reach any other result as to the meaning of these averments, than that the defect in the roadway consisted in the projection of a rock approaching so nearly to passing cars as to strike brakemen while in the discharge of their ordinary duties as such. This is, that certainty to a common intent required in pleading, and is a sufficiently specific averment of the defect counted on.

2. The negligence laid in the second count of the complaint is twofold. It alleges negligence of the conductor in ordering plaintiff to ascend to the top of the train at the point of the defect, and also the negligence of the defendant itself because of the existence of the defect, — the perilous projection of the stone, — and, in effect, that the defect arose from defendant's negligence. It is clear that the negligence of the conductor was dependent upon and resulted from the negligence of the company. But for the defect due to a want of care of the defendant, the conductor's act could not have been a negligent one. With the defect, the defendant was liable with or without concurring negligence on the part of the conductor. Without the defect, the conductor could not have been negligent, or had he been, no injury would have resulted. And the allegation of the conductor's negligence concurring with that of the defendant may be entirely disregarded. It may be granted, indeed, that this count fails to charge any negligence on the part of the conductor for which the company would be responsible; yet, charging, as it does, actionable negligence and resulting injury against the corporation, the latter would, none the less by reason of the abortive averments as to the conductor's want of care, still be liable for the injuries suffered through its own negligence: *Grand Trunk R'y Co. v. Cummings*, 106 U. S. 700; *Booth v. Boston etc. R. R. Co.*, 73 N. Y. 38; 29 Am. Rep. 97; *Stetler v. Chicago etc. R'y Co.*, 46 Wis. 497; *Paulmier v. Erie R. R. Co.*, 34 N. J. L. 157. The first assignment of demurrer to this count is a "speaking" demurrer. It alleges that the only negligence counted on is that of the conductor in giving the order. This, in our opinion, as we have

said, is not the case; and the remaining grounds of demurrer, which proceed upon this erroneous interpretation of the count, must fall with it. The objection taken to the count because of the generality of its averments of negligence is untenable. Numerous adjudications of this court support the view, that, under our system of pleading, very general averments, little short indeed of mere conclusions, of a want of care and consequent injury, leaving out the facts which constitute and go to prove negligence, meet all requirements of the law: *South etc. Alabama R. R. Co. v. Thompson*, 62 Ala. 494, 500; *Leach v. Bush*, 57 Ala. 145; *Mobile etc. R'y Co. v. Crenshaw*, 65 Ala. 566; *South etc. Alabama R. R. Co. v. Bees*, 82 Ala. 340; *Louisville etc. R. R. Co. v. Jones*, 83 Ala. 376; *Western R'y Co. v. Sistrunk*, 85 Ala. 352; *Western R'y Co. v. Lazarus*, 88 Ala. 453; *East Tennessee etc. R. R. Co. v. Watson*, 90 Ala. 41.

3. The stone which collided with the person of the plaintiff did not project sufficiently from the wall of the cut to touch passing cars, though approached so nearly to them as to greatly endanger employees who should at the moment of passing that point be in the act of ascending or descending to or from the top of the train by means of ladders going up on the outside of cars or caboose. It is common knowledge, that this is the usual, if not the universal, method of reaching the roof of freight trains. It may also be said to be common knowledge that employees use this means of ascent and descent while the train is in motion, and generally while it is on its way. The evidence in this case, on the part of both plaintiff's and defendant's witnesses, tends to show that it was a custom on defendant's freight trains generally, as well as this particular one, for brakemen, during the intervals when their services were not needed at the brakes, and especially in inclement weather such as prevailed on the occasion in question, to pass to and from the caboose over the sides of the cars and along these ladders. The evidence further goes to show that conductors made no objection to this practice, and that it was the custom of the conductor of this train to order a brakeman out of the caboose about the place where plaintiff was ordered out by him on this occasion. In view of the exigencies of the service, involving the use of ladders on the sides of cars by employees, and this while the train is in motion, and in view of the custom of resorting to such use, which the evidence here goes to show, we do not hesitate to affirm that it was the part of ordinary care on the part of

the defendant — assuming, as the jury might have found, the truth of this testimony — to construct and maintain its roadway so as not only to admit of the safe passage of its cars, but also free from any projection or obstruction which would endanger the persons of employees in the use of these side-ladders while the train is proceeding on its way, and that the defendant's failure in this regard rendered it liable to the plaintiff for any damages resulting to him from such failure, unless his own negligence proximately contributed thereto: *Kearns v. Chicago etc. R. R. Co.*, 52 Am. & Eng. R. R. Cas. 287; *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183; 4 Am. Rep. 593; *Chicago etc. R. R. Co. v. Russell*, 91 Ill. 298; 33 Am. Rep. 54; *Chicago etc. R. R. Co. v. Johnson*, 116 Ill. 206; *Clark v. St. Paul etc. R. R. Co.*, 28 Minn. 128; *Johnston v. St. Paul etc. R. R. Co.*, 41 Am. & Eng. R. R. Cas. 293; *St. Louis etc. R. R. Co. v. Irwin*, 37 Kan. 701; 1 Am. St. Rep. 266; *Chicago etc. R. R. Co. v. Swett*, 45 Ill. 197; 92 Am. Dec. 206.

4. But it is insisted that, conceding defendant's negligence in the premises, the plaintiff must be held to a knowledge of the defect from which the injury resulted, in such sort that his actual ignorance thereof, and consequent exposure to the dangers incident to it, was negligence on his part which so contributed to the disaster as to deprive him of any right of recovery therefor. We cannot subscribe to this doctrine. Train-men, having no functions to perform in respect of the construction and maintenance of the roadway, have a right to assume its adaptation and sufficiency in all respects to a safe discharge of their duties in another and distinct branch of the general service, and are not held to a knowledge, which has never in point of fact been imparted to them, of defects and dangerous conditions in the culverts, bridges, tracks, embankments, road-bed, cuts, and tunnels of the railway company, or of the dangerous nature of adjacent structures erected or permitted by the company. The duty of the company to this class of its employees is to provide a roadway in all respects reasonably safe for the running of its trains and the performance of the functions imposed upon them by the exigencies of the service, and they have a right to assume, without inquiry or investigation, that this duty has been discharged. The *onus* of inquiry or investigation is not upon them. If, as matter of fact, they know of unsafe conditions in any of these particulars, and continue in the service after the lapse of a reasonable time for the defects to be remedied or removed,

they assume this additional risk, though originally not incident to their employment, but not otherwise: *Myers v. Hudson Iron Co.*, 150 Mass. 125; 15 Am. St. Rep. 176; *Scanlon v. Boston etc. R. R. Co.*, 147 Mass. 484; 9 Am. St. Rep. 733; *Pidcock v. Union Pacific R'y Co.*, 5 Utah, 612; *White v. Nonantum Worsted Co.*, 144 Mass. 276; *Hulsehan v. G. B. W. & S. P. R. R. Co.*, 12 Am. & Eng. R. R. Cas. 208; *Soeder v. St. Louis R'y Co.*, 100 Mo. 673; 18 Am. St. Rep. 724; *Faren v. Sellers*, 39 La. Ann. 1011; 4 Am. St. Rep. 256; *Louisville etc. R. R. Co. v. Hall*, 87 Ala. 708; 13 Am. St. Rep. 84; *Wuotilla v. Duluth Lumber Co.*, 37 Minn. 153; 5 Am. St. Rep. 832.

5. Certain rules of the company were adduced in evidence in its behalf. They require brakemen to "be constantly on the alert, observe carefully the engine-man's signals, and never, under any circumstances, sleep at their posts"; and that they "must not leave their brakes while the train is in motion, nor take any other position on the train than that assigned them by the conductor." These rules were two of five hundred printed in a book of one hundred and twenty-nine pages, and intended for the regulation of all branches of the business carried on by the defendant. There is no evidence that plaintiff was ever required to acquaint himself with these rules, or did in fact know of them or what they contained. His own testimony, that he had no notice of them, is nowhere controverted. These rules can perform no office in the case by way of determining the rights and duties of the plaintiff, except possibly in going to show that plaintiff's services were to be rendered at the brakes on top of the cars when his services were required while the train was in motion, and this is fully shown by his own and other uncontroverted testimony, and they might have been excluded from the jury, except perhaps for this limited purpose. Having been admitted, they cannot be looked to beyond this, and certainly not for the purpose of imputing negligence to the plaintiff because of conduct on his part at variance with that which they prescribe: *Atchison R. R. Co. v. Plunkett*, 2 Am. & Eng. R. R. Cas. 127; *Carroll v. East Tennessee etc. R. R. Co.*, 41 Am. & Eng. R. R. Cas. 307; *Brunswick etc. R'y Co. v. Clem*, 80 Ga. 534, 540, 541.

6. Leaving out of view so much of these rules as requires that brakemen shall remain at the brakes constantly while the train is in motion, we have, on one aspect of the evidence, the following case: The duties undertaken by the plaintiff, in respect of a moving train, were to be performed, as occasion

might require, on the top of the train. There were intervals, as we have seen, of greater or less duration, depending upon the recurrence of grades, the distances between stations at which stops were to be made, etc., during which, ordinarily, he had no duties to perform at the brakes. It was a custom, as we have before shown, obtaining upon defendant's freight trains generally, and on this one, for brakemen to pass such intervals in the caboose, especially in such weather as prevailed at the time of this occurrence, and to go thence to their posts of duty as ordered by the conductor or as occasion required. This usage of the service was known to the conductor in this instance, and was sanctioned and acted on by him in so far as the absence of all objection on his part to the presence of brakemen in the caboose, and all effort on his part to enforce a contrary rule, if such existed and was known to him, and in so far as his dealing with the brakemen in apparent recognition of their right to be there amounted to sanction and action upon the custom. The plaintiff had been only for a short time in the service, and had never been advised that this usage was violative of any rule of the company, or any duty he owed it in the premises. On the occasion in question, he had been, in accordance with the usage, for some time in the caboose with, and without objection on the part of, the conductor, and was injured while going thence to his post of duty, in obedience to an order of the conductor which it was his duty to obey. This order was given, the conductor says, in accordance with a rule of his "to order a man out" at that point to tighten the brakes with reference to a down grade they were approaching, to the end, it seems, that the train might be kept well in hand, with a view of stopping it at a station two miles beyond, where this train generally, but not always, had occasion to stop. On these facts,—the custom participated in and acted upon by the conductor, the ignorance on the part of the plaintiff of a rule to the contrary, injury received while obeying an order which it was plaintiff's duty to obey, and the necessity for which cannot be ascribed to any misconduct of his,—the authorities are full to the proposition, that no negligence can be imputed to the plaintiff, even though a rule to the contrary of this usage did exist and was known to the conductor; and some of them go the length of holding that negligence could not be predicated even of plaintiff's knowledge of the rule, when considered in connection with the custom of its non-enforcement, such as is

disclosed here. Be that as it may, we are clear in the conclusion that the fact of plaintiff's being in the caboose, and the consequent necessity of his exposure to the peril from which the injury resulted in reaching his post of duty, do not import negligence on his part, and would not avail to defeat recovery by him, if the jury found the facts to be in accordance with the tendencies of the evidence we have been considering: Authorities *supra*; *Fay v. Minneapolis etc. R. R. Co.*, 11 Am. & Eng. R. R. Cas. 193; *Barry v. Hannibal etc. R. R. Co.*, 98 Mo. 62; 14 Am. St. Rep. 610; *Union Pacific R'y Co. v. Springsteen*, 41 Kan. 724; note to *Durbin v. Oregon R. R. etc. Co.*, 11 Am. St. Rep. 786; *Kansas City etc. R. R. Co. v. Kier*, 41 Kan. 661; 13 Am. St. Rep. 312; *Sprong v. Boston etc. R. R. Co.*, 58 N. Y. 56; *Rome etc. R. R. Co. v. Chasteen*, 88 Ala. 591.

7. There is some evidence in the record going to show that had the plaintiff obeyed the order upon the instant of its delivery, he might have reached the roof before the car came opposite the projecting rock, and thus have escaped the injury. The delay in executing the order, however, seems from the evidence most favorable to the defendant to have been only for a moment or two, and for the purpose of putting on his overcoat and gloves, — precautions rendered necessary by the inclemency of the weather. We do not think so brief a delay, for so reasonable a purpose, can be contorted into a want of diligence on the part of the plaintiff amounting to contributory negligence.

What we have said will suffice to determine against the appellant all of the assignments of error, and all the exceptions underlying assignments, which proceed severally on the assumptions, — 1. That the projection of the stone toward the roadway did not imply negligence on the part of the defendant, unless it extended sufficiently to endanger passing cars; 2. That it was incumbent upon the plaintiff to know of the defect which caused the injury, and ignorance on his part was negligence which would defeat his right of action; 3. That plaintiff was guilty of contributory negligence, under all aspects of the evidence, in being on the side of the car when he was stricken by the stone, in that it was his duty to have been at that time on top of the train; and 4. That plaintiff was guilty of contributory negligence in failing to obey the order of the conductor upon the instant of its delivery. Our conclusions in these respects dispose of the exceptions reserved to the giving of charges 1, 2, 3, 4, 5, 6, 8, 9, 10, and 11 at the

instance of the plaintiff, and to the action of the court in refusing to give charges 1, 2, 3, 5, 6, 7, 8, 16, 19, 22, 24, and 28 requested by the defendant.

8. The tenth instruction of plaintiff's series, as perhaps one or two others, is faulty, if dissociated from the evidence, in that it would acquit a brakeman of negligence in violating a known rule of the company made for his guidance and by the supreme authority in the premises, merely because of the conductor's assenting to such violation. We do not understand this to be the law, though there are cases which go far in that direction. But this infirmity is relieved by referring the charge to the evidence which negatives plaintiff's knowledge of the existence of such rule.

9. Charges 25 and 28, requested by defendant, were well refused, upon the further ground that they misplace the burden of proof as to contributory negligence. The *onus* in this regard is in all cases on the defendant, though plaintiff's evidence sometimes relieves from the necessity of discharging it: *Columbus etc. R'y Co. v. Bradford*, 86 Ala. 574; *North Birmingham Street R'y Co. v. Calderwood*, 89 Ala. 247; 18 Am. St. Rep. 105.

10. There was no evidence in the case that the conductor knew of the defect in the roadway which caused the injury counted on. The negligence charged against him in respect to ordering the plaintiff out at that point must result, if at all, from the imputation of such knowledge to him, as matter of law, from the relations he sustained to the defendant on the one hand, and the plaintiff on the other. The trial court, in its general charge, and in its refusals of several charges requested for the defendant (Nos. 4, 9, and 23), proceeded on the theory that a conductor, while in control of a train out on the road, is, in some sort, in the shoes of the company, and a vice-principal to whom the law will impute a knowledge of all facts as to the roadway etc., which are known, or ought to be known, to the company itself; and there are not a few well-considered adjudications which so hold: *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415; *Cleveland etc. R. R. Co. v. Keary*, 3 Ohio St. 201; *Louisville etc. R. R. Co. v. Collins*, 2 Duvall, 114; 87 Am. Dec. 486; *Ayers v. Richmond etc. R. R. Co.*, 84 Va. 679; *Chicago etc. R'y Co. v. Ross*, 112 U. S. 377. But our own cases, and perhaps the weight of authority generally, support the contrary view, at least to the extent of holding that, without regard to grade or rank, and whether the ele-

ment of personal control enters into the consideration or not, all who are servants of a common master, engaged in the same general business, subject to the same general control, and are paid out of a common fund, are fellow-servants in respect to all acts done in the common service, unless the duty performed by them be such as properly belongs to the master as such, and in which case they take the place of the master, and he is chargeable with their acts as if performed by him personally with all the knowledge in the premises which the law imputes to him: McKinney on Fellow-servants, p. 53, sec. 23; *Alabama etc. R. R. Co. v. Waller*, 48 Ala. 459; *Mobile etc. R'y Co. v. Smith*, 59 Ala. 245; *Tyson v. South and North Alabama R. R. Co.*, 61 Ala. 554; 32 Am. Rep. 8; *Smoot v. Mobile etc. R'y Co.*, 67 Ala. 13. It may be that some of our cases — that of *Mobile etc. R'y Co. v. Smith*, 59 Ala. 245, for instance — have gone to the extremest verge of soundness in applying the doctrine of fellow-servants to the exemption of the employer from liability; but we apprehend it would be a more radical departure, in the opposite direction, from what may be considered the established rule in our jurisprudence, to hold that a conductor in the control of a train is exercising the functions of the master in giving ordinary directions and orders in the management and running of the train so as to be chargeable with a knowledge of every fact in relation thereto which is known, or of which the law imputes a knowledge, to the master.

11. It seems to us, however, that a decision of that question is not necessary to a correct determination of this appeal. The negligence imputed to the conductor in the second count of the complaint, and which the rulings of the court in certain instructions given and refused allow the jury to impute to him on the theory of his being a vice-principal, is, as we have seen, in its nature secondary and suppletory to that of the defendant itself. If there was a dangerous projection from the wall of the cut, that was the negligence of the defendant, for the injury resulting from which the defendant would be liable under either count of the complaint, as well without as with concurring negligence of the conductor. If there was no such defect, there could be no negligence, either on the part of the defendant directly, or on the part of the conductor, and indirectly, through him, on the part of the defendant. If plaintiff knew of the defect, his contributory negligence, in attempting to ascend the ladder at that point, is not relieved

by the fact that the attempt was made in obedience to the conductor's order. And if the plaintiff was negligent in being in the caboose, his presence there involving a necessity to ascend at that place to the top of the train, that negligence was just the same, in itself and in its results, whether or not the conductor was lacking in due care in ordering him out; or in other words, the rights and liabilities of the parties — the cause of action and the defense to it — being precisely the same whether the negligence is imputed to the conductor or not, the rulings of the court in respect to his alleged negligence, whether sound or not, abstractly considered, could have exerted no influence in the premises; and if error was committed therein, it was without injury, and will not avail to operate a reversal of the judgment.

We have discussed all the questions treated of in the argument of appellant's counsel. Several other matters are assigned as error. They have been carefully considered, but we deem it unnecessary to enlarge upon them here. They involve no error.

The judgment of the city court is affirmed.

RAILROADS — LIABILITY FOR DEFECTS IN ROAD-BED. — A railroad company is liable for injuries suffered by its employees through defects in its road-bed: *Taylor etc. R'y Co. v. Taylor*, 79 Tex. 104; 23 Am. St. Rep. 316, and note 326, 327; *Missouri etc. R'y Co. v. Jones*, 75 Tex. 151; 16 Am. St. Rep. 879, and note; *Vosburgh v. Lake Shore etc. R'y Co.*, 94 N. Y. 374; 46 Am. Rep. 148; *Illinois etc. R. R. Co. v. Welch*, 52 Ill. 183; 4 Am. Rep. 593; such as obstructions so near the track as to interfere with the railway employees in the discharge of their duties when engaged in operating trains: Note to *Chicago etc. R. R. Co. v. Swett*, 92 Am. Dec. 218, 219. Compare also *Kansas City etc. R. R. Co. v. Kier*, 41 Kan. 661; 13 Am. St. Rep. 311.

In *Johnson v. St. Paul etc. R'y Co.*, 43 Minn. 53, it is said that "a railroad company is bound to place signal-posts, or other structures used in connection with its road, or the operation thereof, at a reasonably safe distance from the track, so as not to be dangerous to brakemen or other employees who work on its trains; but if, for any reason, it is found necessary to erect or place such structures so close as to be hazardous to its employees, it is in such case its duty to warn them of the danger." Whether or not a railway company is negligent in leaving a ledge of rock in such a position that it would probably fall upon the track is a question of fact for the jury: *Bean v. Western North Carolina R. R. Co.*, 107 N. C. 731.

MASTER AND SERVANT. -- A servant may presume that his master has performed his duty by supplying safe appliances and machinery, as well as a safe place in which to work, in the absence of evidence showing knowledge to the contrary on the part of the servant: *Chicago etc. R. R. Co. v. Hines*, 132 Ill. 161; 22 Am. St. Rep. 515; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180, and note; *Galveston etc. R'y Co. v. Garrett*, 73 Tex. 262; 15 Am. St. Rep. 781; *Myers v. Hudson I. Co.*, 150 Mass. 125;

15 Am. St. Rep. 176. A railroad employee may assume that the company has so constructed and maintained its road-bed and bridges that a brakeman can with safety perform his duties: *Louisville etc. R'y Co. v. Wright*, 115 Ind. 378; 7 Am. St. Rep. 432, and note; *Chicago etc. R. R. Co. v. Swett*, 45 Ill. 197; 92 Am. Dec. 206, and note; *Johnson v. St. Paul etc. R'y Co.*, 43 Minn. 53; *Bean v. Western North Carolina R. R. Co.*, 107 N. C. 731.

MASTER AND SERVANT — VIOLATION OF RULES BY SERVANT — CONTRIBUTORY NEGLIGENCE. — Disobedience of rules by a servant, in any degree contributing to the injury, constitutes contributory negligence, precluding recovery: *Prather v. Richmond etc. R. R. Co.*, 80 Ga. 427; 12 Am. St. Rep. 263; *Pryor v. Louisville etc. R. R. Co.*, 90 Ala. 32; *Sloan v. Georgia P. R'y Co.*, 86 Ga. 15; *Rome etc. Co. v. Dempsey*, 86 Ga. 499; *Wescott v. New York etc. R. R. Co.*, 153 Mass. 460; *Grand v. Michigan etc. R. R. Co.*, 83 Mich. 564; *Conger v. Flint etc. Co.*, 86 Mich. 76; *Sutherland v. Troy etc. R. R. Co.*, 125 N. Y. 737; *East Tennessee etc. R. R. Co. v. Smith*, 89 Tenn. 114; *Davis v. Nuttallsburg etc. Co.*, 34 W. Va. 500.

But the servant is not bound by a rule not brought to his notice, or which has been habitually violated with the knowledge of the company, or where the customs and practice of the company tend to mislead him in the violation of the rule: *Little Rock etc. R'y Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230; *Barry v. Hannibal etc. R'y Co.*, 98 Mo. 62; 14 Am. St. Rep. 610, and note; *Louisville etc. R. R. Co. v. Hawkins*, 92 Ala. 241. A servant is justified in disobeying a general rule, when he obeys another order given by his master inconsistent therewith: *Hall v. Chicago etc. R'y Co.*, 46 Minn. 439. Disobedience of a rule is not negligence precluding recovery by a servant, when the evidence shows that the injury would have been sustained notwithstanding such disobedience: *Louisville etc. R. R. Co. v. Watson*, 90 Ala. 68; *Whittaker v. President etc.*, 126 N. Y. 544. A switchman, by standing on the foot-board of the tender, "which was put there for switchmen to ride on," is not guilty of contributory negligence, even though the company's rules forbade switchmen to go between cars for the purpose of coupling them: *Richmond etc. R. R. Co. v. Jones*, 92 Ala. 219. See also *Kansas City etc. R. R. Co. v. Kier*, 41 Kan. 661; 13 Am. St. Rep. 311.

MASTER AND SERVANT — ASSUMPTION OF RISKS. — Servants knowing of defects in machinery, etc., by continuing in service after the lapse of a reasonable time for such defects to be remedied, assume the additional risk, though originally not incident to their employment: *Taylor etc. R'y Co. v. Taylor*, 79 Tex. 104; 23 Am. St. Rep. 316; *Titus v. Bradford etc. R. R. Co.*, 136 Pa. St. 618; 20 Am. St. Rep. 944, and note. Compare also note to *Gulf etc. R'y Co. v. Brentford*, 23 Am. St. Rep. 385-388.

CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF. — The burden of proving contributory negligence is upon the defendant: *Murray v. Missouri P. R'y Co.*, 101 Mo. 236; 20 Am. St. Rep. 601; but this rule does not apply where plaintiff's testimony, which seeks to fix negligence on the defendant, inculcates himself also: *North Birmingham Street R'y Co. v. Calderwood*, 89 Ala. 247; 18 Am. St. Rep. 105.

FELLOW-SERVANTS, WHO ARE AND WHO ARE NOT: See *Sherrin v. St. Joseph etc. R'y Co.*, 103 Mo. 378; 23 Am. St. Rep. 881, and cases cited in note; *Ross v. Walker*, 139 Pa. St. 42; 23 Am. St. Rep. 160.

VICE-PRINCIPAL, WHO IS: See *Ross v. Walker*, 139 Pa. St. 42; 23 Am. St. Rep. 160, and note; *Brown v. Gilchrist*, 80 Mich. 56; 20 Am. St. Rep. 496, and note.

COOPER v. GEORGIA PACIFIC RAILWAY COMPANY.

[92 ALABAMA, 329.]

CONNECTING CARRIERS — LIABILITY OF LAST CARRIER — BURDEN OF PROOF AS TO LOSS. — In an action against the last of a connecting line of carriers to recover for the loss of goods shipped on a through-bill of lading, the presumption prevails that the contents of the car delivered to the last carrier were the same, and the goods in the same condition, as when started by the first carrier. The burden of proof, in the first instance, is consequently on the plaintiff to show that the loss occurred while the car was *in transitu*, and without this proof he cannot recover. When this proof is produced, the burden is then on the carrier to show that the car and its contents were in the same condition when received by him as they were when started by the first carrier, or when delivered to him.

ACTION to recover for the loss of one barrel of molasses. Judgment for defendant, and plaintiff appealed.

E. H. Hanna, for the appellants.

Knox and Bowie, for the appellee.

CLOPTON, J. The cause of action indorsed on the summons issued by the justice of the peace before whom the suit was originally commenced is a stated account. In the city court, to which it was removed by appeal, plaintiffs filed, without objection, a complaint setting forth as the cause of action the failure of defendant to deliver one barrel of molasses, which it received as common carrier to be delivered to plaintiffs at Oxford, Alabama, and on this complaint the cause was tried without the intervention of a jury. The evidence, without conflict, shows that a car containing whole and half barrels of molasses was shipped by through-bill of lading from New Orleans, Louisiana, to plaintiffs at Oxford, and when the car, after arrival, was opened, one barrel was found empty. Defendant received the car from the Alabama Great Southern Railroad Company at Birmingham to be transported to Oxford.

Defendant being one of connecting lines of carriers, and in this case the last carrier, the presumption attaches that when the car was delivered to defendant the contents were the same, and the goods in the same condition, as when started by the first carrier at New Orleans; and if it had been shown that loss or injury occurred somewhere on the road of transportation, the burden would have been on the defendant to show what were the contents of the car, and the condition of the goods when received at Birmingham: *Montgomery etc. Ry*

Co. v. Culver, 75 Ala. 587; 51 Am. Rep. 483. The presumption avails in favor of as well as against defendant. The burden, in the first instance, is on plaintiffs to show loss or injury while the car was *in transitu*; that is, to show the quantity and good condition of the goods when shipped at New Orleans, and a failure to deliver the quantity, or a delivery in a damaged condition. There is no evidence tending to show what number of barrels were in the car when it left New Orleans, or that the condition of the goods was different on its arrival at Oxford. The car was sealed at New Orleans, and again sealed at Meridian, without disturbing the first seal, by an intermediate carrier; and when delivered to defendant at Birmingham, and opened at Oxford, the seal was intact. The empty barrel was apparently dry, and no head to the barrel was in the car. The reasonable inference from these facts is, that the barrel was empty when it was put in the car at New Orleans, and that there was the same number of barrels in the same condition as they were when started from New Orleans. Plaintiffs have failed to show any loss or injury while the goods were in transit.

Affirmed.

CONNECTING CARRIERS — LIABILITY OF LAST CARRIER — BURDEN OF PROOF. — The presumption is, that goods were delivered to the last of several connecting carriers in the same condition that they were delivered to the first, and the burden of proof is upon the last carrier to show that they were not: *Savannah etc. R'y Co. v. Harris*, 26 Fla. 148; 23 Am. St. Rep. 551, and note; *Wallingford v. Columbia etc. R. R. Co.*, 26 S. C. 258.

BRADFORD v. MAYOR OF ANNISTON.

[92 ALABAMA, 349.]

MUNICIPAL CORPORATIONS — DUTY IN CONSTRUCTING BRIDGES. — A city, in the construction of bridges across its streets, is required to provide against such casualties liable to occur from overflow as a cautious and prudent man should foresee and anticipate.

MUNICIPAL CORPORATIONS. — NOTICE TO A STREET OVERSEER OF A DEFECT IN THE STREET IS NOTICE TO THE CITY.

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECT IN STREET. — The owner of an animal injured while being driven along the public street by stepping into a hole therein caused by rain may, if free from negligence, recover from the city, when it appears that the defect was known thereto, and had existed so long that it might have been repaired in the exercise of reasonable diligence, and that it failed to do this, or to give any notice or warning to the public. In such case, the fact that

the street force was busy in repairing other damage done by the rain will not excuse the liability, in the absence of proof that by reasonable diligence an extra force could not have been employed by the city for such emergency.

ACTION against a municipal corporation to recover for the loss of an ox killed by the alleged negligence of the city in not keeping its streets in proper repair. Judgment for defendant, and plaintiff appealed.

T. C. and S. S. Sensabaugh, and James H. Savage, for the appellant.

Agee and Micou, for the appellee.

COLEMAN, J. In the location and erection of bridges, regard should be had to the size and nature of the stream, the character and feature of the adjacent grounds, the relative position and formation of the abutting land, its liability to overflow, and their probable extent and duration: *Columbus etc. R'y Co. v. Bridges*, 86 Ala. 451, 11 Am. St. Rep. 58. This is the rule laid down as applicable to railroads, and the same rule is applicable to cities, so far as it requires of them, in the construction of bridges across their streets, to provide against such causalities as a cautious and prudent man should foresee and anticipate.

The evidence shows the branch ran diagonally across the street from a northeastern in a southwestern direction. The banks on the eastern and northern sides were high, and not subject to overflow, while the western and southern bank of the stream was low, and subject to overflow. The lower side was raised by filling in with earth. The sleepers of the bridge rested on the high embankment on the eastern side, and on top of posts placed upright in the channel on the western and lower side, and then ran out on the raised embankment, which constituted the abutment to the bridge.

During an overflow, the current necessarily came with great force against the earth forming the embankment on the lower side, and unless in some way protected, it could not be said that the abutment was constructed with reasonable skill and prudence. After the injury had occurred, it was shown that by the use of boxing and other appliances the embankment and abutment on the lower side made by earth was properly protected against the current of an overflow. The evidence was in conflict as to whether this boxing had been so placed

and constructed before the injury, and whether it was a part of the bridge when the damage occurred. Looking at all the evidence, we cannot say the conclusion of the court on this question was erroneous.

The evidence, however, shows that the injury was caused by a hole about one foot in diameter in or near the abutment. This hole was in one of the main thoroughfares of the city, over which people from the suburbs and country daily traveled with wagons and vehicles. It was admitted that the street overseer saw this hole about nine o'clock, A. M., and plaintiff's ox fell in this hole about one o'clock, P. M., of the same day.

Notice to the street overseer was notice to the city: *Whitfield v. City of Meridian*, 66 Miss. 570; 14 Am. St. Rep. 596, and authorities cited in note. Nothing was done to remedy the danger caused by this hole, and no notice, warning, or signal posted, or otherwise given, by which the traveling public was made aware of or could learn of the existence of this dangerous hole in one of its main thoroughfares. The only excuse given for leaving the highway in this dangerous condition, from nine o'clock, A. M., until in the afternoon, was, that the street force was busy in repairing other damages caused by the rain of the previous night. There is no evidence to show that by the exercise of reasonable diligence extra force could not have been employed by the city for the emergency, and no excuse whatever pretended to be given why some notice or signal was not put up at this dangerous place to warn the traveling public of its existence.

This was negligence *per se*, making the city liable for injury caused thereby, unless the party injured was guilty of contributory negligence: *City Council of Montgomery v. Wright*, 72 Ala. 420; 47 Am. Rep. 422; *South etc. R. R. Co. v. McLendon*, 63 Ala. 266. The plaintiff's ox was being driven along this usually traveled thoroughfare, without any notice or knowledge of the existence of the hole on the part of the person having him in charge. There is no evidence tending to show plaintiff was guilty of contributory negligence.

The declaration avers that plaintiff was driving his oxen, while the evidence shows his son was driving. The bill of exceptions fails to state whether the son was driving for his father, or in his own right; whether he was still a minor, or *sui juris*. These questions do not seem to have been raised in the court below, but only the negligence of the defendant

seems to have been considered. There was no error in the ruling of the court on the admission of testimony.

Reversed and remanded.

THE CASE OF *Mayor etc. of Birmingham v. Lewis*, 92 Ala. 352, was an action by Maggie Lewis against a municipal corporation to recover for personal injuries alleged to have been caused by the negligence of the city in failing to keep a certain street in repair. On the trial below, it appeared that a sewer about three feet across and from four to six feet deep, constructed by the city several years before, extended across Eighteenth Street in the center and business portion of the city of Birmingham. Said sewer was covered to the surface level, except that an opening into it was left on the east side of said street, adjoining a wooden bridge which spanned the sewer at its intersection with the sidewalk. Such opening was about three by four feet across, and extended to the bottom of the sewer. The surface of the opening was on a level with the street, and was unguarded by railings, lights, or otherwise. The city had known of this opening in the sewer since its construction, and had been notified that persons had fallen into it. There was some conflict in the evidence as to whether or not this opening was outside the bridge and sidewalk, or whether it encroached thereon so as to be immediately in the path of pedestrians. Maggie Lewis had lived for several weeks prior to her injury in a house on Eighteenth Street, and during that time had not been on the street at night, and did not know of the opening into the sewer. On the night of the accident, she went across said street to make a purchase at a store, and in returning fell into said opening, thereby breaking one of her legs. As a result of the injury thus sustained, she was confined to her bed for nine weeks, suffered great pain, and at the time of the trial, nearly one year thereafter, she was unable to walk without limping, and the injury might prove permanent. The defense relied upon was the general issue, and contributory negligence. The city sought at the trial to introduce evidence to show that it had no funds with which to improve Eighteenth Street; that it had levied the full rate of taxation allowed by law, and had other expensive corporate duties to perform. The court refused to admit this evidence, as immaterial, and the appellant excepted. Judgment was rendered in favor of plaintiff for one thousand dollars, and the defendant appealed. The appellate court, in passing upon the issues thus presented, said, in effect, that the city was guilty of obvious and glaring negligence in permitting an opening such as that described to remain in an open and public city street, where, of necessity, it was of constant peril to travelers; citing *City Council of Montgomery v. Wright*, 72 Ala. 411; 47 Am. Rep. 422; *Albritten v. Mayor etc. of Huntsville*, 60 Ala. 486; 31 Am. Rep. 46; and the principal case above reported; that, in view of the fact that charter authority existed requiring certain inhabitants of the city to work a certain time each year on the streets, or to pay a certain sum in lieu thereof to be applied to their improvement, and that as the offer of proof did not go to the extent of showing that the city had exhausted this means of improving the streets, or had exhausted all the means at their command to that end, the evidence offered was immaterial and properly excluded: *Weed v. Ballston Spa*, 76 N. Y. 329; *Shelby v. Claggett*, 46 Ohio St. 549. The inability of the city to repair or improve Eighteenth Street would not relieve the city of its negligence in allowing the hole in the sewer to remain in the street, unless the peril to travelers arising therefrom could not have been obviated by the erection of guards

around it, or by the placing of signals to give due warning of the danger, and no excuse was offered by the city for its failure to provide such safeguards or signals. The dangers incident to the unguarded pit in the sewer could have been provided against, though the city did not have the means to improve or repair the street, and it had no more right to plan or create a dangerous condition of one of its streets than it had to plan or create a public nuisance: *Gould v. Topeka*, 32 Kan. 485; 49 Am. Rep. 496; 2 Dillon on Municipal Corporations, sec. 1016, note 3. Although it may be true that in the present case vindictive damages are not recoverable against the city, still, due compensation cannot be denied for personal injury involving physical pain and loss of health, suffered in consequence of the city's negligence, merely because of the public character of the corporation: 2 Dillon on Municipal Corporations, note to sec. 1020. The authorities all recognize bodily pain and disfigurement as items for which compensation may be made by the assessment of damages for personal injury: *Barbour Co. v. Horn*, 48 Ala. 566-577; *Mason v. Ellsworth*, 32 Me. 271; 5 Am. & Eng. Ency. of Law, 42; 2 Sedgwick on Damages, 7th ed., 543, note a. In view of this rule, and the injury suffered by the appellee in this case, the damages assessed cannot be deemed to be excessive. The judgment of the lower court was therefore affirmed.

MUNICIPAL CORPORATIONS — DEFECT IN STREET — LIABILITY FOR. — A municipal corporation is bound to keep its streets in reasonable repair, and where a defect has been in existence for some time, the city will be liable for injury caused thereby: *Maus v. City of Springfield*, 101 Mo. 613; 20 Am. St. Rep. 634, and note; see note to *Rowell v. City of Lowell*, 66 Am. Dec. 466, 467; *Cline v. New Orleans*, 41 La. Ann. 1031. A city is bound to keep its streets in reasonable repair, and is liable in damage for its neglect so to do: *Farquar v. Roseburg*, 18 Or. 271; 17 Am. St. Rep. 732; *Dundas v. Lansing*, 75 Mich. 499; 13 Am. St. Rep. 457, and note.

MUNICIPAL CORPORATIONS — NOTICE TO OFFICERS NOTICE TO CORPORATIONS. — Notice to officers or agents of a municipality concerning things within the scope of their duty is notice to the municipality: *Dundas v. Lansing*, 75 Mich. 499; 13 Am. St. Rep. 457, and note. Knowledge by a policeman of a defect in a street is knowledge of the city: *Carrington v. St. Louis*, 89 Mo. 208; 58 Am. Rep. 108; *Rehberg v. Mayor of New York*, 91 N. Y. 137; 43 Am. Rep. 657; same rule holds with regard to a councilman: *Logansport v. Justice*, 74 Ind. 378; 39 Am. Rep. 79; *Columbus v. Strassner*, 124 Ind. 482.

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECTIVE CONSTRUCTION OF BRIDGE. — A city is liable for such a defective construction of a bridge as will cause injury in time of a freshet: *Perry v. Worcester*, 6 Gray, 544; 66 Am. Dec. 431, and extended note.

ELYTON LAND COMPANY v. BIRMINGHAM WAREHOUSE AND ELEVATOR COMPANY.

[92 ALABAMA, 407.]

CORPORATIONS — LIABILITY OF SUBSCRIBERS FOR STOCK PAID FOR IN PROPERTY. — Under the constitution and statutes of Alabama, where corporate stock subscriptions are made payable in property, it must be taken at a reasonable money value, and although a margin will be allowed for honest differences of opinion as to such value, deliberate and intentional overvaluation is not permissible; and when such overvaluation is grossly excessive and intentionally made, though without actual fraud, it is invalid as to corporation creditors, who may proceed against the stockholders individually as for unpaid stock subscriptions.

CORPORATIONS — UNPAID STOCK SUBSCRIPTIONS — LIABILITY TO CREDITORS. — Any arrangement between stockholders and the corporation to issue stock as fully paid for, though only partly paid for in fact, either in money or property, and by which the corporation does not get the benefit of the full price of the stock in good faith, may be valid and binding between the corporation and the stockholders; but it is invalid as to the creditors of the former, and may be set aside at their instance, and full payment on the stock enforced for the satisfaction of the corporate debts.

CORPORATIONS — CAPITAL STOCK — RIGHT OF CREDITORS. — The capital stock of a corporation constitutes the basis of its credit, and persons dealing with the corporation have a right to assume that the stock has been actually paid in, or that it may be reached for corporate debts.

CORPORATIONS — LIABILITY OF SUBSCRIBERS — RIGHTS OF CREDITORS. — Where parties organize a corporation with a capital stock of two hundred and fifty thousand dollars, and subscribe for the whole stock, giving in payment therefor, without actual fraud, a bond for title to land costing them five thousand dollars, the actual value of the land being fifty thousand dollars, for the payment of the remainder of the purchase price of which the corporation gives its notes, the stockholders are liable to the creditors of the corporation to the extent of the difference between the actual value of the property and the amount of their subscriptions, under constitutional provision prohibiting the issue of stock except for money or property actually received, and a statutory requirement that all stock subscriptions shall be paid in money or labor, or property at its money value.

Alexander T. London, for the appellant.

Garrett and Underwood, for the appellee.

WALKER, J. The bill was filed by the Elyton Land Company as a judgment creditor of the Birmingham Warehouse and Elevator Company, a corporation, and its purpose is to secure the payment of the judgment by the enforcement of the alleged unsatisfied liability of the individual defendants as original subscribers to the stock of the defendant corporation. It is averred that said individual defendants pretend

that they have discharged and satisfied their liability as such subscribers, but it is alleged that the transaction whereby it was attempted to discharge that liability is merely colorable, and is void as against the creditors of said corporation, and that said subscribers are liable to pay in money the amount of their said subscriptions, or so much thereof as is necessary to satisfy said judgment. The following is the substance of the case stated by the bill: On the ninth day of March, 1887, the Elyton Land Company executed and delivered to the defendant J. A. Van Hoose, as trustee for the Birmingham Warehouse and Elevator Company, a corporation then in process of organization, its bond of title for two blocks of land near the city of Birmingham, to be paid for at the price of fifty-three thousand dollars. Said Van Hoose paid to the Elyton Land Company five thousand dollars on the execution and delivery of the bond for title, by the terms of which it was provided that he was to execute a transfer and conveyance of his rights and interests thereunder to the Birmingham Warehouse and Elevator Company upon its organization, and that that company should make its nine notes for the balance of the purchase-money to the Elyton Land Company, said notes to be each for \$5,333.33, bearing interest from August 20, 1886, payable respectively at one, two, three, four, five, six, seven, eight, and nine years from that date. On the nineteenth day of February, 1887, said Van Hoose and the other individual defendants, Johnston, Sage, and McLester, filed their petition in the office of the probate judge of Jefferson County for the organization as a corporation of the Birmingham Warehouse and Elevator Company, the capital stock of which was to be fixed at two hundred and fifty thousand dollars, to be divided into two thousand five hundred shares of one hundred dollars each. On the same day a commission was issued to said Van Hoose, Johnston, Sage, and McLester, constituting them a board of corporators, and authorizing them to open books of subscription to the capital stock of the proposed corporation. On the eleventh day of March, 1887, said board of corporators, over their signatures, reported and certified to said probate judge that on the ninth day of March, 1887, they had opened books of subscription to the stock of said proposed corporation, and that they had each subscribed for five hundred shares, "subscribed through James A. Van Hoose, trustee for the subscribers, and payable in real property near the city of Birmingham, . . . of the money value, stated

in said subscription, of \$250,133.33, subject to the unpaid purchase-money due to the Elyton Land Company, amounting to \$50,133.33, the payment of which is to be assumed by said company, said lands being fully described in the bond for titles of the Elyton Land Company to said James A. Van Hoose, trustee, dated March 9, 1887, which said trustee is to convey to said company in payment of said 2,000 shares of stock," and Van Hoose, Johnston, Sage, and McLester each subscribed for one share payable in money. Said corporators further reported that on the organization of said company, said Van Hoose, Johnston, Sage, and McLester were present, and each represented in person 501 shares in stock; that each of said persons was elected a director of said corporation, and that the board of directors elected Van Hoose as president, and McLester as treasurer and secretary, of the corporation. It was further reported and certified by the corporators that on the tenth day of March, 1887, after the organization of said company, all the capital stock thereof payable in money was paid to the treasurer, and all the property subscribed was delivered to him. The subscriptions were made as reported, and certified by the corporators. It was not true, at the time of the filing of the bill, or when the subscriptions were made and reported, that said land was of the money value of two hundred thousand dollars. The price named in said bond for title, fifty-three thousand dollars, was at the time of said subscriptions the full money value of said land when sold on long credit. Said Van Hoose, Johnston, Sage, and McLester well knew that said land was not worth, nor was it of the money value, of two hundred thousand dollars, or anything near that sum. After said subscriptions were made, and after said Birmingham Warehouse and Elevator Company was organized, said Van Hoose indorsed to it said bond for title, and said company executed its nine promissory notes as, by the terms of the bond for title, it was provided it should do; and said Van Hoose, Johnston, Sage, and McLester now claim that the assignment of said bond was a discharge and satisfaction of said subscription of two hundred thousand dollars, which has not been otherwise paid. It is this transaction which the bill alleges is merely colorable, and is void as against the creditors of said corporation. Only five thousand dollars has been paid on account of said purchase-money. The Elyton Land Company has recovered judgment against said Birmingham

Warehouse and Elevator Company on two of said notes. That judgment remains unsatisfied, and said corporation has no property out of which it could be satisfied by execution.

Each of the individual defendants demurred to the bill upon the following, among other, grounds: 1. That the bill on its face shows that the complainant has no right to the relief therein prayed, because it shows that this defendant owes nothing to the Birmingham Warehouse and Elevator Company, either in unpaid subscriptions for stock, or otherwise; 2. Because said bill alleges no facts which render this defendant liable personally in any way for the alleged debt mentioned therein as due from said Birmingham Warehouse and Elevator Company to the complainant; and 3. Because said bill shows that this defendant subscribed for stock in said Birmingham Warehouse and Elevator Company payable in property at a valuation mentioned in said subscription, which property has been delivered and received in full payment for said stock, and said bill fails to show that said property was overvalued unreasonably, intentionally, and fraudulently, or that the defendant has made a profit from the stock so subscribed and taken by him. A decree was rendered sustaining the demurrers as to the grounds here mentioned. The appeal is from that decree.

On the averments of the bill, it is to be taken as true that the property which was received by the corporation as full payment of the stock subscription was worth only five thousand dollars, the amount which had been paid on the bond for title. It follows that the decree of the chancery court involves the assertion of the validity, as against the creditors of the corporation, of the payment of a stock subscription of two hundred thousand dollars by the transfer to the corporation of property worth only five thousand dollars. In reviewing this determination, regard is to be had to certain constitutional and statutory provisions which are to be construed and applied in the light of settled principles governing the relations of stockholders to the corporation of which they are members, and to the creditors thereof. By the constitution of 1875, it was provided that "no corporation shall issue stock or bonds except for money, labor done, or money or property actually received, and all fictitious increase of stock or indebtedness shall be void," and that "dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable

otherwise than for the unpaid stock owned by him or her": Const., art. 14, secs. 6, 8. Prior to the adoption of the present constitution, each stockholder in any corporation was liable to the amount of stock held or owned by him, the law imposing a liability not only to the extent that the stock was unpaid, but for an additional sum equal to the amount of such stock: Const. 1868, art. 13, sec. 3; Rev. Code 1867, sec. 1760; *McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala. 401. Before the creation of this additional liability, the stock and other property of a private corporation was regarded and treated in a court of equity as a trust fund for the payment of the debts of the corporation, and in the event of the insolvency of the corporation, unpaid stock subscriptions could be condemned for the satisfaction of the creditors, and said additional liability was a mere increase of the security for the payment of the corporate debts: *Smith v. Huckabee*, 53 Ala. 191. While corporate creditors were secured by this special liability existing in their favor, there was no direct constitutional or general statutory prohibition against the abuse of corporate powers by the issue of stock not in good faith representing the value of money, services, or property actually contributed to the corporate enterprise; and the general incorporation law then in force contained no requirements as to the mode of subscribing for stock, or as to how the subscription liability should be satisfied: Code 1867, pt. 2, tit. 2, c. 3, 4. The dangers to which corporate creditors were exposed by the absence of such regulations were obviated by the provisions for said additional liability. When those provisions were repealed by the constitution of 1875, there was an obvious necessity of providing that the trust fund, the remaining security for corporate creditors, should exist as a thing of substance, and that the liability for unpaid stock should not be merely illusory. This necessity was not overlooked. The former legislative policy of securing corporate creditors by making the stockholders liable to them in amounts over and above what they could be called upon to pay on their stock subscriptions gave place to a new policy, the aim of which was to afford proper security to persons dealing with corporations by prohibiting the issue of stock except for value received by the corporation, and by providing definite regulations for the payment of stock subscriptions in money, or in labor or property at its money value. This new policy is evidenced generally by section 6 of article 14 of the constitution, quoted

above, and particularly as to manufacturing, mining, immigration, and industrial business corporations by section 1805 of the code of 1876, which provides that "all subscriptions to the capital stock of any company organized or proposed to be organized under the provisions of this article shall be made payable in money, or in labor or property at its money value, to be named in the list of subscription, and in case of a failure to perform the labor, or deliver the property, according to the terms of the subscription, the money value thereof as named in the lists of subscription shall be paid by the subscribers." These enactments are not for the benefit of corporate creditors alone. The policy evidenced thereby bears upon the relations of corporations to the public, and upon the relations of stockholders to each other, to the corporation, and to its creditors. This court has not heretofore had occasion to pass upon the question as to the effect of these provisions upon the rights of corporate creditors. The effective operation of the constitutional provision in other connections has been recognized in several cases. In *Fitzpatrick v. Dispatch Publishing Co.*, 83 Ala. 604, it was held, at the instance of an objecting stockholder, that, under the constitutional and statutory provisions, a corporation with a paid-up capital of ten thousand dollars has no authority to double its capital stock and distribute the new stock among its stockholders as a stock dividend on the mere statement that its capital stock "has been invested in property which has more than doubled in value, and is now worth twenty thousand dollars over and above all liabilities"; and an injunction was issued to restrain and enjoin the corporation from carrying into effect a resolution which had been adopted by the stockholders for the issue and distribution of such new stock. In the course of the opinion, it was said: "Let us not, by timid interpretation, impair the strength of this bulwark, erected by our constitution-makers, against the frauds which have become the reproach of the age we live in." In *Williams v. Evans*, 87 Ala. 725, it was held that relief could not be granted on an executory contract to pay for the transfer of a subscriber's right under a stock subscription, whereby it was provided that the corporation to be formed should issue "five dollars of stock for one dollar of subscription." The stock had not been issued when the contract in suit was made. The court said: "A contract which contemplates the violation of a statute or a constitution, as a mode of executing such contract, is illegal and void. . . . One of

the purposes of this clause of the constitution was to protect the public, as well as stockholders, against spurious and worthless stock by the process of watering, — in other words, from fraudulently issuing and putting on the market fictitious corporate stock which is based on nothing valuable as a consideration for its issue. It is greatly to the interest of the public that the policy of this provision should be enforced." In *Parsons v. Joseph*, 92 Ala. 403, the bill, to which a demurrer was overruled, was filed by a stockholder to secure the cancellation of certain certificates of stock issued to another stockholder, on the ground that the stock so issued was fictitious, and that its issue was in violation of the constitution and the statute law of the state. It was alleged that certain stock was paid for in full by conveying to the company thirty-nine acres of land at an agreed price and valuation of \$137 per acre, when the land was not worth more than \$25 per acre; that afterwards the capital stock of the company was doubled, and without further consideration than the thirty-nine acres of land the amount of stock issued therefor was doubled. The contention was in regard to this latter issue of stock. It was alleged that the excessive valuation of the land was made knowingly, willfully, and with the fraudulent intent of having the fictitious stock in question issued in violation of law. On these averments it was held that the stock in question was issued in violation of section 1662 of the code of 1886, and of section 6, article 14, of the constitution. It is to be observed that the respective requirements of section 1805 of the code of 1876 and section 1662 of the code of 1886 as to how stock subscriptions shall be payable differ in this, that the former requires the subscriptions to be made payable in money, or in labor or property at its money value, to be named in the list of subscription, while the latter provides that all subscriptions must be payable in money; but the commissioners may receive subscriptions payable in money, the subscriber having the privilege of discharging the same by the rendition of stipulated necessary services, or the performance of stipulated necessary labor for the corporation at the reasonable value of such services or labor, or in property, at the reasonable value thereof. It does not seem, however, that the variations in the terms of these two statutes are such that the fact that the stock subscription was made under the one or the other of them would make any sub-

stantial difference in the right of a stockholder to object to the issue of other stock representing property received by the corporation at an excessive and fraudulent overvaluation. In the case last cited, it was suggested that stockholders who knowingly and intentionally have subscribed and paid for stock with property upon a fictitious valuation are liable to creditors as stockholders who have not paid up in full for their stock; but the question of such liability was not presented in that case. In *Tutwiler v. Tuscaloosa Coal, Iron, and Land Co.*, 89 Ala. 391, several questions that might arise from the issue of stock for property taken at a palpably excessive valuation were stated, but not decided. It is plain from this review of the decisions that the constitutional and statutory provisions in question are treated as effectual to prevent the courts from lending their aid for the enforcement of any contract or obligation the execution of which involves a disregard of those regulations, and that so far as they are appropriate for the protection of stockholders from improper discriminations in accepting payments for stock, those regulations are accorded such effect and operation as to fully accomplish this purpose of their enactment. It cannot be doubted that the protection of the interests of corporate creditors is as much within the aim and policy of those regulations as were the objects in behalf of which they have been successfully invoked in this court. In considering the claim of corporate creditors to hold the stockholders of the corporation individually liable, on the ground that an attempt by them to satisfy their stock subscriptions by the transfer to the corporation of property at a gross overvaluation was not such payment as the law requires, the fact is not to be lost sight of that the solution of the question is dependent, in some measure at least, upon constitutional and statutory provisions which the court has already construed as amply effectual to secure the accomplishment of other objects also within the purview of the enactments. And it may be added that a like beneficial operation should be accorded to those provisions when invoked in furtherance of either of their manifest purposes.

It is impossible to reconcile the decisions of the various courts upon the question of the liability to the creditors of the corporation of stockholders on stock issued for property taken at an overvaluation. We will briefly consider the cases principally relied on to support the proposition that such liability cannot be maintained. In *Coit v. Gold Amalgamating Co.*,

119 U. S. 343, the liability was claimed on the ground that the stock was paid for in property at a valuation illegally and fraudulently made at an amount far above its actual value. The court found that this claim was not sustained by the evidence. It was said in the opinion: "The corporators may have placed too high an estimate upon the property, but the court below finds that its valuation was honestly and fairly made; and there is only one item — the value of the charter privileges — which is at all liable to any legal objection. But if that were deducted, the remaining amount would be so near the aggregate capital that no implication could be raised against the entire good faith of the parties in the transaction." It is plain that this case is not an authority against the existence of the liability contended for by appellant. In *Brant v. Ehlen*, 59 Md. 1, there was no assertion of the absence of such liability. It was expressly stated in the opinion that the questions presented were dealt with upon the assumption that the sale and purchase of the lands, which were paid for in stock, were made in good faith. Another case decided subsequently, and reported in the same volume (*Crawford v. Rohrer*, 59 Md. 599), shows clearly the rule prevailing in that state on the subject under consideration. In that case it was decided that "any arrangement among stockholders, or those in charge of the affairs of the corporation, by which the stock is but nominally paid for, whether in money or property, the corporation not in fact getting the benefit of the price in good faith, will be regarded as a sham and not as a valid payment, as against the creditors of the corporation, however it may be regarded as between the corporation and the subscriber." In *Carr v. Le Fevre*, 27 Pa. St. 413, a stockholder was sought to be charged on stock which had been paid for in land. It was said in the opinion: "There is nothing in the special verdict tending to show that there was any fraud in this transaction," and that "the parties took the precaution to have the lands valued and appraised. We are bound to presume that this was fairly done." The element of gross overvaluation was lacking in that case. In this particular, it was like the Alabama case of *Davis v. Montgomery Furnace and Chemical Co.*, Ala., Dec. 10, 1890. In *Van Cott v. Van Brunt*, 82 N. Y. 535, it appeared that stock and bonds of a railroad company were issued to a contractor for the building of the road, and that the work done under the contract was of less value than the par of the stock and bonds agreed to be paid therefor. By this arrangement

the stock was disposed of in good faith and without fraud, though for less than its face value. It was held that the liability of the stockholder had been discharged. On page 542 of the opinion, it is made to appear that the transaction was without the influence of statutes in that state, somewhat similar to provisions prevailing here, as will be shown by references to be made to other New York decisions. This case has several times been the subject of unfavorable comment: Taylor on Private Corporations, 2d ed., sec. 545, note 5; 2 Morawetz on Private Corporations, sec. 826; Cook on Stocks and Stockholders, sec. 47, note 6; *Jackson v. Traer*, 64 Iowa, 483; 52 Am. Rep. 449. *Phelan v. Hazard*, 5 Dill. 45, was a suit by a creditor to charge a transferee of stock who had purchased the same for value and in good faith as full-paid stock. It was said that a liability could not be established against the defendant by showing that the property conveyed to the corporation in payment for the stock was not worth the amount of the stock, or that it was not worth anything over and above the mortgages upon it at the time of the transfer. The court held that the agreement whereby property was received in payment for the stock was conclusive upon the company and its creditors, until by direct attack it has been impeached and rescinded for fraud; and it was said that "the courts, even where the rights of creditors are involved, will treat that as payment which the parties have agreed should be payment." This case was followed as authority in *Coffin v. Ransdell*, 110 Ind. 417. The three cases last cited represent the weight of American authority opposed to the recognition of the liability asserted in the case at bar. It is to be remarked that in neither of those cases were any statutory provisions mentioned as having any bearing upon the conclusions reached. It is also to be noted that in the latter two of the three cases English decisions were principally relied on as authority. The opinions in both those cases quote with approval from *In re Baglan Hall Colliery Co.*, L. R. 5 Ch. 346, where it was said, in reference to the right of a creditor to question the payment for stock by a transfer of property at an overvaluation, that "the test to be applied is this: Could the company, by any proceeding, have set aside the transaction?" The English rule seems to be, that the creditor can have no other or greater rights in this regard than the corporation itself could assert. In this country, on the contrary, the best authorities maintain that arrangements to issue stock as full-paid, though only

partly paid for in fact, may be valid and binding between the company and its stockholders, and yet may be set aside at the instance of creditors, and full payment on the stock enforced for the satisfaction of the debts of the corporation: *Scovill v. Thayer*, 105 U. S. 143; *Curry v. Woodward*, 53 Ala. 371. This latter rule results from the doctrine, well established in America, that the stock subscribed is considered in equity as a trust fund for the payment of creditors: *Wood v. Dummer*, 3 Mason, 308; *Montgomery etc. R. R. Co. v. Branch*, 59 Ala. 139; *Smith v. Huckabee*, 53 Ala. 191; *Paschall v. Whitsett*, 11 Ala. 472; *Allen v. Montgomery R. R. Co.*, 11 Ala. 437. This doctrine, first distinctly enunciated in *Wood v. Dummer*, 3 Mason, 308, does not prevail in England as in this country: Taylor on Private Corporations, sec. 658, note 1; Cook on Stocks and Stockholders, sec. 42. The absence of the recognition in English cases of this trust feature of a subscription to stock renders them unsafe guides in American courts when dealing with questions relating to the liability of stockholders in reference to the debts of the corporation.

Several cases are cited in support of the contention that the provision of section 6, article 14, of the constitution does **not** have such effect on the transaction in this case as to leave the stockholders who participated therein still liable for the debts of the corporation. In *Memphis etc. R. R. Co. v. Dow*, 120 U. S. 287, it was held that a similar provision of the constitution of Arkansas did not authorize a corporation itself to repudiate its liability on two million six hundred thousand dollars in bonds and one million three hundred thousand dollars in stock, both of which had been issued in payment for property worth only one million three hundred thousand dollars. This case involves no question of the right of creditors to charge stockholders. As has been already shown, an arrangement which would preclude the corporation from demanding further payment upon stock issued by it would not prevent creditors from proceeding against the stockholders if the stock has not really been paid for. Nothing is said in that case to indicate that the transaction would have been sustained to the same extent as against the creditors of the corporation. The case is not an authority against the existence of the liability here asserted. The same thing may be said of the case of *Peoria etc. R. R. Co. v. Thompson*, 103 Ill. 187, which is cited in the opinion in the case just mentioned. In *Stein v. Howard*, 65 Cal. 616, it was held that an increase

of capital stock, under a resolution authorizing the additional shares to be sold at eighty-seven and one half cents on the dollar, was not such "a fictitious increase of the stock" as was prohibited by a constitutional provision similar to ours. Neither in this case nor in the two cases cited just before it is there anything in the report to indicate what, if any, statutory regulations prevailed in those states in reference to the mode in which subscriptions to stock in corporations should be made payable.

We will now turn to the principal cases which assert the invalidity, as against creditors, of attempts to satisfy the liability on stock subscriptions by the transfer of property at a gross overvaluation. In *Jackson v. Traer*, 64 Iowa, 469, 52 Am. Rep. 449, the facts were, that a railway company had been indebted to a construction company in the sum of seventy thousand dollars, which it was unable to pay, and in satisfaction of the debt it issued to the construction company certificates of stock of the face value of three hundred and fifty thousand dollars, which shares were distributed among the members of the construction company. It was held that such members were to be treated as stockholders who had paid twenty per cent on their stock, the stock held by them being five times greater in amount than the debt for which it was issued, and that they were liable to a creditor of the corporation to the extent of the unpaid eighty per cent of the par value of the stock. To the same effect is *Osgood v. King*, 42 Iowa, 478. In neither of these cases does it appear that the statutes of Iowa require subscriptions to stock to be made payable in any particular mode. The existence of the liability was not made to depend upon a statutory requirement in this regard. By the New York statute governing the organization of corporations for manufacturing purposes it is provided "that the trustees of such companies may in good faith purchase property necessary to their business, and issue stock to the amount of the value thereof in payment therefor, and the holders of such stock are exempt from liability for the debts of the corporation." In *Douglass v. Ireland*, 73 N. Y. 100, it appeared that the capital stock of a corporation, organized under that act, to the amount of three hundred thousand dollars was issued in consideration of the assignment to the company of executory contracts for the purchase of property found by the jury to be of the value of sixty-eight thousand dollars. The defendant acquired his stock with a

full knowledge of the facts, having, as a trustee of the corporation, participated in the transaction. He was held liable as a stockholder who had not fully paid up. The court said: "A deliberate and advised overvaluation of property thus purchased and paid for is a fraud upon the law, and a violation of the condition upon which the exemption of stockholders from liability under the provisions of the statute is made to depend. It is in direct violation of the policy as well as the terms of the law which demand payment, either in money or property at its value, of all the capital stock of the company, as a condition of immunity to the stockholders from liability for debts of the corporation. The payment of an amount for property in excess of its value deprives creditors and the public of the security contemplated by the statute, and thus a fraud is perpetrated as well upon the law as upon creditors. The fraud is consummated by the issue of stock as fully paid, under the act of 1853, which has not been fully paid for in value by the property for which it is issued, and it does not depend upon any fraudulent intent, other than that which is evidenced by the act of knowingly issuing stock for property to an amount in excess of its value. All that is necessary to establish the legal fraud and take the stock issued out of the immunity assured to stock honestly issued in pursuance of the act of 1853 is to prove two facts: 1. That the stock issued exceeded in amount the value of the property in exchange for which it was issued; and 2. That the trustees deliberately, and with knowledge of the real value of the property, overvalued it, and paid in stock for it an amount which they knew was in excess of its actual value." The rule laid down in this case is firmly established in New York: *Boynton v. Andrews*, 63 N. Y. 93; *Schenck v. Andrews*, 57 N. Y. 133; *Boynton v. Hatch*, 47 N. Y. 225; *Lakè Superior Iron Co. v. Drexel*, 90 N. Y. 87. A New Jersey statute authorized payment for capital stock to be made "either in money or in land,— the land to be appraised by the board of directors, and taken at such value, on such terms as may be agreed on." The capital stock of a corporation was fixed at one hundred thousand dollars, all of which was subscribed for by five persons, who became the directors of the company. Certain lands were purchased for fifty thousand dollars, and the deed thereto was made directly to the corporation, which gave its obligations for the whole of the purchase-money. The directors then appraised the lands at one hundred thousand

dollars, and credited fifty thousand dollars of that valuation as a payment of fifty per cent on their stock subscriptions. The lands were not worth more than the original purchase price. On this state of facts it was held, in *Wetherbee v. Baker*, 35 N. J. Eq. 501, that, as against creditors of the corporation, such allowance of credit on the subscriptions was invalid, and that the stockholders were liable for the whole amount of their subscriptions. In reference to the valuation of the land by the directors, as authorized by the statute above quoted, the court say: "The directors, in making the appraisement and valuation and dealing with their stock subscriptions, act in a fiduciary capacity, and are bound to discharge the duties of the trust with fidelity. This appraisement, it is manifest, was illusory, and made only in the interest of the directors who were to profit by it"; and that "in all such cases transactions under such powers have been upheld only where the contract for the rendition of services or the purchase of property payable in stock has been made in good faith, and the property taken in payment of stock subscriptions has been put in at a fair *bona fide* valuation; and the courts have inflexibly enforced the rule that payment of stock subscriptions is good as against creditors only where payment has been made in money, or in what may fairly be considered as money's worth. In *Bailey v. Pittsburg etc. Coal and Coke Co.*, 69 Pa. St. 334, the facts were, that Bailey, with two other persons, on September 29th, purchased certain land for one hundred and twenty-five thousand dollars, and on October 1st, following, the corporation agreed to take the land at an advance of fifty thousand dollars, subject to the whole purchase-money, so that the stock subscription of fifty thousand dollars made by Bailey and the two others should be paid for in full by the agreed advance on the land. The statute provided that "no share shall be issued for less than its par value." It was held that by such a transaction Bailey did not pay for his stock, and that he was still liable thereon. Rights of creditors were not involved in this case. The transaction was regarded as a fraud on the rights of other stockholders, and as involving a non-compliance with statutory safeguards intended for the protection of the public. The case is not unlike the Alabama case of *Parsons v. Joseph*, 92 Ala. 403.

The review of the authorities will not be further extended. Discussions of them may be found in Cook on Stocks and Stockholders, secs. 38-47; 1 Morawetz on Private Corpora-

tions, secs. 425-429; 2 Morawetz on Private Corporations, secs. 825 et seq.; 2 Waterman on Corporations, sec. 188; Taylor on Private Corporations, secs. 545, 701 et seq. Our examination satisfies us that the weight of American authority does not support the statement made by Mr. Cook in section 47 of his work on stocks and stockholders, to the effect that the attempts which have been made, in cases where stock was issued for property taken at an overvaluation, to hold the party receiving such stock liable for its full par value, less the actual value of the property received from him, have been unsuccessful; and that if there has been an overvaluation which is shown to have been fraudulent, then the contract is to be treated like other fraudulent contracts, and is to be adopted *in toto*, or rescinded *in toto* and set aside. We have found no authority at all asserting the exemption of the stockholder from such liability, where it appeared that the stock subscription was governed by a statutory regulation at all similar to section 1805 of the code of 1876, or section 1662 of the code of 1886. On the other hand, the New York, New Jersey, Maryland, and Pennsylvania decisions which have been cited show that the courts in those states, in giving effect to statutory requirements certainly no more stringent than ours as to the mode in which stock subscriptions shall be made payable, do not allow attempted payments in property worth greatly less than the amount of the stock issued therefor to foreclose the just demands of corporate creditors to require that the stock subscriptions be made good in money, or in money's worth, as contemplated by the statutes. Those courts recognize in such provisions safeguards intended for the protection of persons dealing with corporations as well as for the corporations themselves and the persons associated together therein.

Our general laws afford the amplest and freest facilities for persons desiring to engage in almost any kind of lawful venture to secure by corporate association the advantages of defined and limited responsibility, and at the same time the efficient execution of their purposes by means of an artificial being, changes in the membership of which cause no break in the continuity of its action, nor affect its capacity to act, within the scope of its powers, as a natural person. It is plain that such associations, endowed with such powers and privileges, would be a source of danger to persons dealing with them, unless the law required that in their formation

suitable provisions be made for a substantial responsibility for such engagements as they may enter into. When legal provisions are found which are appropriately framed to secure the existence of such responsibility, it is not permissible so to construe them as to allow a mere formal and illusory compliance therewith to defeat the objects intended to be accomplished. No argument is needed to show that a requirement that the stock of a corporation shall be paid in money, or in labor or property at its money value, inures to the benefit of persons who may become creditors of the corporation, in that it requires the capital stock to be the representative of substantial values, and insures the existence of a fund which must be within reach for the satisfaction of debts, if the affairs of the corporation are managed as contemplated by the law. It is equally clear that if a stock subscription which is required to be made payable in money, or in labor or property at its money value, and is in fact made payable in property at a designated money valuation, may be satisfied by the transfer of property, the value of which is insignificant or merely nominal as compared with the valuation stated, then, so far as this provision of the law looks to the protection of creditors, it might as well have allowed the subscription to be made payable in "chips and whetstones." Except section 6 of article 14 of the constitution and section 1805 of the code of 1876, there were not, at the time of the formation of the appellee, in reference to the mode of satisfying stock subscriptions, adequate provisions for the protection of creditors of such corporations. Those enactments are appropriate for this purpose. The requirement of section 1805 of the code of 1876, that "in case of a failure to perform the labor or deliver the property according to the terms of the subscription, the money value thereof as named in the lists of subscription shall be paid by the subscribers," cannot be regarded as providing for a penalty to compel the performance of the labor or the delivery of the property. The evident meaning is, that, in the event of such failure, the corporation shall receive the equivalent, and no more nor less than the equivalent, in money of the labor or the property, as the case may be. This clause of the statute is convincing that the statement of the money value of the property in which the subscription is made payable is a material feature of the contract, and that the property delivered must be of a value to correspond with that named in the subscription. As af-

fecting the rights of creditors, the statute is simply a definite requirement as to what shall constitute that trust fund to which persons dealing with the corporation have a right to look. The defendants in this case, in making and accepting payments on the stock subscriptions, were acting in a fiduciary capacity in reference to that fund.

The performance of the contract of subscription, to be binding on creditors, should have been such as is required in the case of a contract between a trustee and one having knowledge of his trust obligation. In form, the stock subscription was such as the statute called for. Under section 2023 of the code of 1876 and section 8 of article 14 of the constitution, the stockholders are liable only for the unpaid stock owned by them. But the creditors are entitled to demand that the payment on the stock shall be an actual and *bona fide* discharge of the liability imposed by the contract of subscription. The defendants, in making and accepting payment in property, were bound to exercise their judgment and discretion fairly and honestly directed to secure a substantial compliance with the terms of the contract. In the exercise of that judgment and discretion, they are entitled to the benefit of whatever margin there may be for honest differences of opinion in the valuation of the property. But a deliberate and intentional overvaluation of the property is not permissible. The transfer of property known to be worth only five thousand dollars to pay a stock subscription of two hundred thousand dollars does not bear the semblance of a compliance with the contract of subscription as to one of the essential terms thereof. The taking of property at a valuation forty times greater than its actual worth, which was known to the parties, shows upon its face the absence of a *bona fide* exercise of judgment and discretion in making the valuation, and an intentional non-compliance with the requirement that the property shall be taken at its money value. The absence of fraudulent motive on the part of a trustee does not give validity to a mere simulated execution of the trusts; and an averment of fraud in reference thereto is unnecessary. The parties beneficially interested in the trust are entitled to a substantial compliance with its terms. They are not bound by an act of mere formal compliance which really involves their practical exclusion from the benefits intended to be secured to them. The capital stock of a corporation constitutes the basis of its credit, and persons dealing with the corporation have a right

to assume that the stock has been actually paid in, or that it may be reached. The transaction whereby payment was attempted to be made, as shown by the averments of the bill in this case, is not binding on creditors, because it did not constitute such a payment as was contemplated by the terms of the contract of subscription, and was, in effect, a palpable evasion of the requirements of the statute. It is, however, contended in the argument for appellees that the appellant, through its officers, knew of the history of the organization of the appellee corporation and of the mode in which the subscriptions to the stock were to be paid; that in fact it was an active promoter of the whole transaction in advance. It may be that such an unauthorized extinguishment of the subscription liability may not be impeached by one who was actively instrumental in securing the organization of a corporation with a view of making a sale of property to it, and did in fact accept benefits in dealing with the corporation with full knowledge of the arrangement by which the stock was proposed to be paid for. Disability to question a wrongful transaction usually attaches to a party who consented thereto or participated therein: *First National Bank v. Gustin Minerva etc. Min. Co.*, 42 Minn. 327; 18 Am. St. Rep. 510; *Bank of Fort Madison v. Alden*, 129 U. S. 372; *Parsons v. Joseph*, 92 Ala. 403; 2 Morawetz on Private Corporations, sec. 829. But the averments of the bill in this case do not show that the appellant participated in or knew of the mode in which the stock subscription was undertaken to be paid. In the absence of averments upon this subject, it is not to be taken for granted that the appellant, in making the agreement to convey the land to the corporation when formed, contemplated that the stock in the corporation should not be paid for as the law directed; or that in accepting the notes of the corporation it had such knowledge and such part in the furtherance of the acts connected with the transfer of the bond for title for the stock, that it is to be presumed to have dealt with the corporation on the basis of treating its capital stock as fully paid up. We find nothing in the averments of the bill to preclude appellant from asserting the right of a creditor of a corporation to hold stockholders liable for subscriptions to stock not really paid for. The statements of fact in the bill support the conclusion therein averred, that the transaction by which payment for the stock was attempted to be made was merely colorable; in other words, that it was not really a payment, but

had only the outward appearance, without the substance, of payment. Such being the case, the individual defendants are still liable on their stock subscriptions to the extent that the attempted payment falls short of a *bona fide* compliance with the terms of the contract; and the allegations as to excessive overvaluation of the property in question were sufficient, under the rules above stated. The chancery court erred in sustaining the demurrers.

Reversed and remanded.

CORPORATIONS — LIABILITY OF SUBSCRIBERS FOR STOCK PAID FOR IN PROPERTY. — Where subscribers for corporate stock paid for the same in property known by them to be worth much less than the par value of the stock, they will be liable to creditors of the corporation for such difference: *Gogebic etc. Co. v. Iron etc. Min. Co.*, 78 Wis. 427; 23 Am. St. Rep. 417; and note; see note to *Thompson v. Reno etc. Bank*, 3 Am. St. Rep. 817; *National etc. Co. v. Gilfillan*, 124 N. Y. 302.

CORPORATIONS — UNPAID STOCK SUBSCRIPTIONS — RIGHTS OF CREDITORS. — The issuance of corporate stock for an inadequate consideration is a fraud upon the corporation creditors, and the holders of such stock will be liable to them for its par value: *Gogebic etc. Co. v. Iron etc. Min. Co.*, 78 Wis. 427; 23 Am. St. Rep. 417, and note; see note to *Thompson v. Reno etc. Bank*, 3 Am. St. Rep. 806; *McAvity v. Lincoln etc. Co.*, 82 Me. 504; *Boulton etc. Co. v. Mills*, 78 Iowa, 460; *Bates v. Great etc. Tel. Co.*, 134 Ill. 536.

CORPORATIONS — BASIS OF CREDIT — CAPITAL STOCK. — When a corporation is organized under authority of the state, its capital stock becomes the basis of its credit, to which creditors may look for satisfaction: *Marshall etc. Co. v. Killian*, 99 N. C. 501; 6 Am. St. Rep. 539, and note.

ROVELSKY v. BROWN.

[92 ALABAMA, 522.]

REAL ESTATE PARTNERSHIP — SPECIFIC PERFORMANCE OF CONTRACT FOR SALE. — One member of a partnership, engaged in the business of buying and selling real estate, can bind the firm by a contract in the firm name for the sale of partnership land, and such contract will be specifically enforced against all the partners.

PARTNERSHIP REAL ESTATE is in equity, and for partnership purposes, to be treated as personality.

H. L. Martin, for the appellant.

G. L. Comer, for the appellee.

WALKER, J. B. S. Brown and A. J. Smith were partners, doing business in the town of Ozark, in this state, under the firm name of Brown and Smith. On the twenty-seventh day of September, 1889, said Brown, in the name of the firm, sold

to Rovelsky a house and lot in the town of Ozark at the price of seven hundred dollars, received five hundred thereof in cash, and signed the firm name to a bond for title purporting to bind A. J. Smith and B. S. Brown under the firm name of Brown and Smith. Rovelsky was put in possession of the property by Brown, and thereafter tendered the balance due on his purchase, and demanded of the partners a conveyance of title to the property. Smith refused to join in the conveyance. Thereupon Rovelsky filed his bill for the specific enforcement of the contract evidenced by the bond for title. Brown interposed no defense. Smith defended on the ground that the property in question was owned by himself and Brown as joint tenants, or tenants in common, and that the sale by Brown was made without his knowledge or consent, and was repudiated by him because, in respect to his right and title to his undivided half-interest in said real estate, he was in no way bound by the acts of said Brown.

Smith, by the terms of his answer and by the statements in his deposition, assumed the position that the land in question should not be treated as partnership property, but as any other land held by a tenancy in common. The bill avers that Brown and Smith were engaged in buying and selling real estate for speculation and profit, and that they engaged in that business as partners; that they bought and sold real estate as partners under the firm name of Brown and Smith. These averments are sustained by the testimony of Brown, of the complainant, and of Barnes, all to the effect that Brown and Smith were partners in the real estate business, and were engaged in buying and selling lots in and around Ozark; that they treated and rented their property there as firm property, and, prior to the sale now sought to be enforced, each of the partners, in the name of the firm, was trying to make sale of the lot in question for the purpose of paying the debts of the firm. Brown stated that, prior to the purchase of the lots, he and Smith (the latter did not reside at Ozark) had formed a partnership for the purpose of buying and selling real estate in the town of Ozark, and that it was agreed that Brown should make the purchases; that he did make the purchases, and Smith afterwards paid his part of the purchase-money to Brown, and the property was regarded as **having** been bought with partnership money; and that both **members** of the firm had the right to bargain for the sale of any of the lots belonging to the firm. Smith alone was examined in his own behalf.

He stated that the partnership of Brown and Smith was formed for the purpose of manufacturing brick; that each member was to share equally in the profits and losses; that there was no written contract, or articles of partnership; "that there was no written or verbal contract by said firm, or among the members thereof, authorizing the firm, as such, to purchase real estate or deal in real estate." He further stated that in 1887, Barnes, who then owned the lot in controversy, offered it to him at the price of six hundred dollars; that he then told Brown to purchase it at that price; whereupon Brown approached Barnes and offered to purchase at that price, but Barnes then refused that offer, and proposed to sell at eight hundred dollars; that Brown then closed the trade at the last-named price, and took a bond for title in his own name; that thereafter Brown told witness of the purchase, and witness said it was all right, and paid his half of the cash payment to Brown. The witness denied that he ever gave his consent for Brown to sell his half-interest in the lot in controversy to Rovelsky, or to any one else; but he did not deny the truth of any of the statements made by the other witnesses, to the effect that the firm of Brown and Smith was as a matter of fact engaged in the business of buying and selling real estate in and around Ozark; that they dealt with their property there as firm property, and that each of the partners had been trying to sell the lot in controversy for the purpose of paying the partnership debts. Smith does not intimate that he joined Brown in the purchase of the lot in controversy for any other purpose than in the way of speculation or trading. We are satisfied from the evidence that the lot was bought by Brown and Smith in the course of a general dealing engaged in by them in the business of buying and selling real estate, and that it, like other lots owned by them, was treated and regarded by them, and is to be treated and regarded by the court, as partnership property. So treating it, will the contract made in the name of the firm by Brown alone, be specially enforced against Smith?

The doctrine is familiar, and is illustrated by many reported cases, that when partnership funds have been used in the acquisition of real estate, whether the title be taken in the name of one partner, or in the name of all, so as to make them in law tenants in common, such property will for certain purposes be treated in courts of equity as personalty: *Powers v. Robinson*, 90 Ala. 225, and authorities there cited. This doc-

trine has usually been invoked for the purpose of enforcing the payment of partnership debts, or to secure a proper division of the assets on a settlement of the partnership affairs; and sometimes the courts, having in view only these familiar applications of the rule, have spoken of it existing for the two purposes above mentioned. Such statements, on their face, may suggest a doubt as to whether the doctrine can be invoked for any other purpose. In an ordinary trading or commercial partnership, the usual dealings of the concern in the course of its business are with money or other personal property. Real estate does not figure in the regular dealings of such a partnership; but it often happens that real estate is acquired in the collection of debts, or the funds of the firm may find their way into real estate in other modes. Still, real estate does not become the subject-matter of the regular business dealings of the firm. It is disposed of, or if it remains on hand, that part of the partnership funds which has been used in its acquisition is thereby practically withdrawn from the business. The real estate is not, in such cases, used for partnership purposes except by selling it and returning the proceeds to the business, there to be used in trade, in paying debts, or in a distribution on a settlement of the partnership affairs. If not so voluntarily applied by the partners themselves, courts of equity are not likely to be appealed to in reference to such real estate, as affected by the partnership relation, except to reach it as a depository or hiding-place of partnership funds for the purpose of enforcing the payment of debts, or to secure an equalization in division among partners. The fact that in most of the reported cases the equitable jurisdiction has been invoked only for one or the other, or both, of these two special purposes, is an explanation of the habit of speaking of the rule as existing for those purposes without mentioning other purposes which, on consideration, may be found to be equally within the reason of the rule. There are manifest reasons for the existence of this equitable rule of treating partnership real estate as personal property. A general partnership is a scheme of co-ordinate contribution, effort, and action by each for all. The property and resources contributed by the several members constitute a fund specially appropriated for use in carrying on the partnership business, for the satisfaction of partnership obligations, and for a ratable division of what may be left among the partners. None of these special purposes could be effectually carried out as to real estate, if the

incidents of the legal ownership of that kind of property are recognized in the partnership dealings. The powers of the several general partners in the acquisition, management, control, and disposition of the partnership property in the course of business would be impossible of adequate exercise if hampered by the restrictions which at law embarrass the ownership and alienation of real estate. The incidents of dower, heirship, etc., practically preclude, so far as real estate is concerned, a recognition at law of that species of title which the partnership and the several members thereof have in the firm property; for each has the power of absolute disposition within the scope of the business, and in the case of the death of a member, the survivor or survivors are vested with an exclusive title and right of disposition for partnership purposes. It is plain, without further illustration, that in dealing with partnership real estate for partnership purposes, it is impracticable to recognize the incidents of its legal ownership. And it is equally plain, without any illustration at all, that it would be grossly unjust, both in respect to the relations of the partners with each other, and as regards the partnership dealings with others, to allow the investment of partnership funds in real estate to limit or to enlarge the rights and powers of the several partners as to the firm property, or to cut off or restrict the appropriation of the partnership property to the purposes above mentioned, to which it has been specially set aside and devoted. Such inequitable results are obviated by treating, so far as necessary to accomplish the purposes of the partnership, such real estate as personal property. And why should not such real estate be treated as personal property when it is the subject-matter of the ordinary business of the partnership, as well as when it is sought to be reached to enforce the payment of debts, or to effect a settlement of the partnership affairs? It is a fact that the buying and selling of real estate is a regular business engaged in throughout the country. Many partnerships are in existence devoted exclusively to the transaction of this kind of business. Real estate is the subject-matter of their trading operations. They deal in it as a commodity. It is their stock in trade. The obligations they assume directly affect and involve the title to that character of property. If a debt contracted in a transaction having no connection with real estate by a member of an ordinary commercial firm acting within the scope of the business may be enforced against land, merely because part-

nership funds have been used in its acquisition, *a fortiori* the obligation of one member of a real estate partnership, undertaken in the regular course of trade in reference to the kind of property which is the special subject-matter of their business, should be effectually enforceable against all the partners, and should reach and bind the property dealt in.

If the several partners in a firm engaged in the business of buying and selling real estate cannot bind the firm by purchases or sales of such property made in the regular course of business, then they are incapable of exercising the essential rights and powers of general partners, and their association is not really a partnership at all, but a several agency, the acts of each member being subject to ratification or repudiation by the other members, or by their wives, or if they should die, by their widows, heirs, or devisees. In short, we are unable to discover any satisfactory reason for denying to a court of equity the power to treat real estate as personalty, in order to make binding partnership obligations in reference to the particular subject-matter of the regular dealings of the firm, when that rule sought to be invoked to this end is readily applied to enforce the payment of ordinary debts, or to secure a partnership division, which, as compared with the immediate and primary aim of carrying on the regular business of the concern, are the secondary and ultimate purposes to which the partnership property has been pledged or devoted. And authorities are not wanting to support the conclusion that the rule is not confined in its application by any such unreasonable distinction. In *Lang's Heirs v. Waring*, 17 Ala. 145, it was said: "So far as the partners and their creditors are concerned, real estate belonging to the partnership is in equity treated as mere personalty; and so it will be deemed as to all other intents, if the partners have, by agreement or otherwise, impressed upon it that character." In a suit to recover commissions for finding a purchaser of real estate, brought by a man who had been employed by one member of a firm to sell the partnership land, it was said: "There is no doubt that a copartnership may exist in the purchase and sale of real property, equally as in any other lawful business. Nor is there any doubt that each member of such copartnership possesses full authority to contract for the sale or other disposition of its entire property, though, for technical reasons, the legal title vested in all the copartners can only be transferred by their joint act": *Thompson v. Bowman*, 6 Wall.

316. One member of a partnership engaged in the business of buying and selling real estate fraudulently, and without the knowledge of his copartners, represented to a purchaser that the partnership land which was the subject of the sale was oil-producing. In an action for damages for the fraud and deceit, it was held that both partners were liable. In the course of the opinion, the court says: "When the partnership business is to deal in real estate, one partner has ample power, as general agent of the firm, to enter into an executory contract for the sale of real estate": *Chester v. Dickerson*, 54 N. Y. 1; 13 Am. Rep. 550. "When real estate is brought into the partnership business, it is treated in equity as personal estate, and a lease of it by one partner is as much a partnership transaction as a sale of partnership goods by him would be": *Moderwell v. Mullison*, 21 Pa. St. 257. When land is purchased to be dealt in as a commodity, this would seem to be, for the purposes of such dealing, an out and out conversion of it into personalty, and each partner can bind the firm by contracts for its disposition: *Ludlow v. Cooper*, 4 Ohio St. 1; *Olcott v. Wing*, 4 McLean, 15; *Pugh v. Currie*, 5 Ala. 446; *Frost v. Wolf*, 77 Tex. 455; 19 Am. St. Rep. 761; 1 Bates on Limited Partnership, secs. 298, 299. Our conclusion is, that partnership real estate is in equity, and for partnership purposes, to be treated as personalty; and that one member of a partnership engaged in the business of buying and selling real estate can bind the firm by contract in the firm name for the sale of partnership land, and that such contract should be specially enforced against all the partners. This conclusion does not involve a disregard of the rule laid down in *Lang's Heirs v. Waring*, 25 Ala. 640; 60 Am. Dec. 533; for the conversion into personalty is only so far as may be called for to effectuate the purposes of the partnership; and when the partnership has come to an end, and its purposes have been fully accomplished, the real estate resumes its legal characteristics.

The acts of the defendant Smith indicate that when he learned of the sale made by Brown at first he treated it as binding on him; for it was stated by two witnesses, who are not contradicted, that his demand on Rovelsky was, not for a rescission or a non-assertion of the contract as against him, but for a transfer of the title bond to him or to his friend Baldwin. Smith himself says he offered to repay the five hundred dollars to Rovelsky, thereby implying that such

repayment was necessary to get rid of the effect of Brown's act. This conduct might, without relying on the consideration stated above, be regarded as having the effect of making the contract of sale binding on him; for if Smith, in his dealings with Rovelsky, treated the sale made in the firm name by Brown as having such effect that a transfer of the title bond to Baldwin would confer upon him a valid claim to the property, that, perhaps, amounted to such a subsequent parol ratification of Brown's act as to supply his original want of authority to make the sale: *Herbert v. Hanrick*, 16 Ala. 581; *Grady v. Robinson*, 28 Ala. 289; *Gunter v. Williams*, 40 Ala. 561; and if a ratification was once made, it was irrevocable: *Whitfield v. Riddle*, 78 Ala. 99; *Andrews v. Ætna Life Ins. Co.*, 92 N. Y. 596. In view, however, of the assertions made by Smith, as soon as he heard of the sale, that he had a half-interest in the property, and that the sale by Brown was without his knowledge or consent, we prefer not to rely upon a ratification evidenced by conduct of an equivocal nature, but base our conclusions upon the considerations above set forth. Still, the evidence as to Smith's conduct in his dealings with Rovelsky is significant, as indicating that he was under the impression that one partner did have the right to bind the firm by such a contract as Brown had entered into, and that in enforcing the contract the court is not recognizing an obligation which was not supposed to exist.

In copying the depositions of B. S. Brown, D. Rovelsky, and Jesse W. Barnes into the transcript, the register has written out, in the form of continuous paragraphs, the interrogatories, or parts thereof, and the answers, or parts thereof, without numbering or otherwise separating or identifying the interrogatories or the answers. This mode of copying depositions is unnecessarily confusing. To comply with rule 25 of the rules of practice in this court (Code 1886, p. 803), the interrogatories and the answers thereto, which should immediately follow in the copy, ought to be plainly separated and identified. No costs will be taxed to the register for copying into the transcript the depositions of the three witnesses above named.

The decree of the chancery court is reversed, and a decree will be here rendered for the specific enforcement of the contract of sale, appellee Smith to pay the costs in this court and in the chancery court.

Reversed and rendered.

PARTNERSHIP — POWER OF ONE PARTNER TO BIND FIRM. — Within the scope of the partnership business, one partner may bind the firm: *London etc. Soc. v. Hagerstown etc. Bank*, 36 Pa. St. 498; 78 Am. Dec. 390, and note; *Warder v. Newdigate*, 11 B. Mon. 174; 52 Am. Dec. 567, and note; *National etc. Bank v. Noyes*, 62 N. H. 35; *Flarsheim v. Brestrup*, 43 Minn. 298.

PARTNERSHIP — REAL ESTATE, WHEN TREATED AS PERSONALTY. — Real estate of a partnership will be treated in equity, as between the partners and their creditors, as personalty, when it has become partnership property: *Ware v. Owens*, 42 Ala. 212; 94 Am. Dec. 642, and note; *Roberts v. McCarty*, 9 Ind. 16; 68 Am. Dec. 604, and note; *Dickey v. Shirk*, 128 Ind. 278.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

SMITH v. DAVIS.

[90 CALIFORNIA, 25.]

JURISDICTION OF COURT TO APPOINT TRUSTEE OF LAND IN ANOTHER STATE. — Where a deed of trust respecting land in another state, made and executed in this state, expressly provides that if the trustee named in it shall fail or refuse to accept or carry out the trust, a new trustee may be appointed by a court of competent jurisdiction, a court of this state which has acquired jurisdiction of the parties may, upon the refusal of the trustee named in the deed to act, appoint a new trustee to carry out the trust.

TRUSTS. — THE TRUSTEE'S ASSENT IS NOT NECESSARY to the validity of a trust deed; nor does the fact that he is incompetent to act render the trust void as between the parties thereto, but a court of competent jurisdiction has power to substitute a new trustee to enforce the trust and carry out its objects.

SIGNATURE OF TRUSTEE NOT ESSENTIAL TO VALIDITY OF TRUST DEED. — It is not essential to the validity of a trust deed that it shall be signed by the trustee, although it was intended to be signed by him, where the other parties who sign it expressly agree that it shall be binding as between them, regardless of the trustee.

NON-JOINDER OF PARTY NOT AVAILABLE WHEN. — Where one of the parties to a trust deed, who is made a party defendant in an action to appoint a new trustee, transfers all his interest in the land to a third person, after the execution of the deed, and after the commencement of the action, he is not in a position to complain that such third person was not made a party to the action, if he did not ask to have him so joined.

ACTION to appoint a new trustee and to enforce a trust. The opinion states the facts.

James G. Maguire, and Whittemore and Sears, for the appellants.

James L. Crittenden, for the respondent.

GAROUTTE, J. Respondent filed his complaint in equity to appoint a trustee, and to have the execution of a trust relating to certain lands in Washington Territory decreed.

The complaint, filed May 23, 1885, alleges that on July 27, 1881, said Smith and Davis executed and delivered each to the other a certain document, purporting to be an "indenture tripartite," whereby they purported to convey said land to the London and San Francisco Bank, Limited (a corporation), in trust, for certain specified purposes; that by the terms of its charter said bank was incapable of taking the title sought to be conveyed by the indenture, and was without power to act as trustee in the indenture specified; that defendant Davis refused to regard and carry out the conditions of the indenture, and plaintiff asks that the court appoint a trustee, and that the said trustee be directed to execute the trusts therein contained.

Defendants filed a general demurrer, which was overruled, when defendant Davis answered, setting out, among other things, that after the filing of the complaint in this action he sold and transferred all his interest and right in the land described to one Margaret H. McDonald, and that since that time he has had no interest in and to said real estate.

The defendant bank answered that it had no legal capacity to take the title sought to be conveyed, never consented to act as trustee, and refused so to act.

The findings of the court are in consonance with the allegations of the complaint; and the court also found that defendant Davis had transferred his interest as set forth in his answer.

This appeal is from the judgment appointing a trustee and directing an execution of the trust.

Appellant insists that the court had no jurisdiction or authority to appoint or constitute a trustee of land lying outside of the territorial limits of the state of California.

There is no question as to the general principle of law that in respect to realty every attempt of any foreign tribunal to found a jurisdiction over it must, from the very nature of the case, be utterly nugatory; for land is held by the laws of the country where it is situated, and the tribunals administering those laws are the proper forums in which titles to realty should be litigated. The effect of a court's decree is necessarily limited by the boundary lines of its jurisdiction.

In the case of *Lindley v. O'Reilly*, 50 N. J. L. 636, 7 Am.

St. Rep. 802, where a court of Pennsylvania adjudged a conveyance of land in New Jersey to be a mortgage, and canceled the same, all in parties living in Pennsylvania, the court said: "The decree cannot operate *ex proprio vigore* upon the lands in another jurisdiction to create, transfer, or vest a title. The courts of one state or country are without jurisdiction over title to lands in another state or country." While the rule is as above stated, yet there is another rule firmly established and of universal application, and it is: "In cases of fraud, trust, or contract, the jurisdiction of a court of chancery is upheld wherever the person be found, although lands in another state may be affected by the decree." In the case of *Massie v. Watts*, 6 Cranch, 158, Chief Justice Marshall said: "Was this cause therefore to be considered as involving a naked question of title,—was it, for example, a contest between Watts and Powell,—the jurisdiction of the circuit court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract or as trustee, or as the holder of the legal title acquired by any species of *mala fides* practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found. And the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction."

In *Wimer v. Wimer*, 82 Va. 901, 3 Am. St. Rep. 126, we find this language of the court: "But whilst this is true, it is undoubtedly well settled that in cases of fraud, trust, or contract, courts of equity will, whenever jurisdiction over the parties has been acquired, administer full relief, without regard to the nature or situation of the property in which the controversy had its origin, and even where the relief sought consists in a decree for the conveyance of property which lies beyond the control of the court, provided it can be reached by the exercise of its powers over the person, and the relief asked is of such nature as the court is capable of administering."

Story quotes the following language of Lord Kenyon, used in a case pending before him: "These cases clearly showing that with regard to any contract made in equity between persons in this country respecting lands in a foreign country, particularly in the British dominion, this court will hold the same jurisdiction as if they were situated in England":

Story's Eq. Jur., sec. 1293. Referring to trusts, Story says: "If the proper parties are within the reach of the process of the court, it will be sufficient to justify the assertion of full jurisdiction over the subject in controversy."

Barger v. Buckland, 28 Gratt. 850, was a suit of creditors to subject to the payment of their claim lands of their debtor situate in Virginia and West Virginia, which lands had been conveyed, in trust, to secure other debts. The trust was created in Virginia, the parties resided in Virginia, except the trustee, who resided in West Virginia, and who neglected or refused to carry out the trust.

In *Poindexter v. Burwell*, 82 Va. 514, the court, in reviewing the decision in *Barger v. Buckland*, 28 Gratt. 850, says: "Upon default of payment, there being no trustee to execute the contract of the parties to sell the land and pay the debt, under the circumstances the court, in order to perform the contract of the parties, and to fulfill its own maxim that a trust shall not fail for want of a trustee, decreed that unless the grantor should pay the debt within a prescribed period, then certain named persons should execute the trust by selling the land and applying the proceeds to the payment of the debt."

Upon principle, this case appears to be identical with the case at bar. If the London and San Francisco Bank had been competent to accept the trust, and had accepted it, and this plaintiff was here asking that the trustee execute the trust, there is no question but what a decree to that extent would be sustained by this court, for the authorities are universal to that effect.

If the court has the power and if it is its duty to execute the trust, can it be deprived of that power and released from that duty because there is no trustee to carry out the mandate of the court? or rather, is it not specially within the line of its duty to create an instrument whereby its decree may effect the true purpose and object intended?

The decrees of courts of equity primarily and properly act *in personam*, and at most collaterally only *in rem*.

If the parties are within the jurisdiction of the court, an injunction will be granted to stay proceedings in a suit in a foreign country.

A trust will be enforced pertaining to realty, regardless of the situation of the property.

Courts of equity have, as between the parties, reviewed the

judgments of foreign courts, and even sales made under those judgments, when fraud or undue advantage was shown.

A specific performance of a contract of sale of lands situated in a foreign country will be decreed in equity.

These actions will be supported where the court has jurisdiction of the parties, and are familiar illustrations found in Story's Equity Jurisprudence, sections 1290 et seq.

A decree to convey land lying in another state does not affect the title; it only operates upon the person who is to make the conveyance, and it is his act in making the deed that affects the title.

This deed of trust was made and executed in San Francisco, California, by the plaintiff and defendant Davis, and was recorded in King County, Washington Territory. It expressly provided that "the trusts hereby created shall not lapse or become void by reason of the failure or refusal of the party of the third part to accept or carry out the same"; and further provided that a new trustee should be appointed by the mutual consent of the parties, or by a court of competent jurisdiction, upon the happening of any of the foregoing contingencies. It is further provided that all the conditions and provisions of this agreement "shall apply to and be binding upon their heirs, . . . or any other trustee that may be appointed in its place or stead."

The defendant bank, under its charter, could not take the title to the realty, but the parties of the first and second part expressly guarded against such contingency defeating the trust provisions of the indenture by covenanting that, notwithstanding the happening of such event, the indenture should still remain in full force and effect as between themselves, and that a new trustee should be appointed to carry out the trusts, and that all the provisions and conditions of the agreement should apply to and be binding upon such trustee.

There can be no question but that this indenture, is still alive and in full force and effect as between the plaintiff and defendant Davis, for they expressly provided that such should be the fact.

Upon a careful reading of the decree of the court, we find it simply appoints a trustee and commands him to enforce the trust; there is nothing contained therein purporting or attempting to transfer title to or vest title in the trustee appointed by the court.

If title to the Washington Territory realty does not vest in the trustee, then appellant is not injured, and his contention has no support; if the title to this realty does vest in the trustee, it must be by operation of law, or by virtue of the contract of the parties, for the decree does not so provide, and does not purport *ex proprio vigore* to vest a title in the trustee, Brittan.

In this case the trust did not fail as between the parties by reason of the incapacity and refusal of the original trustee to act.

"The assent of the trustee is not necessary to the validity of the trust deed. He may refuse to act, be unable to comply with the statute, or die, and in such or similar cases a court of chancery will execute it": *Furman v. Fisher*, 4 Cold. 630; 94 Am. Dec. 210; *Field v. Arrowsmith*, 3 Humph. 442; 39 Am. Dec. 185, and note; Flint on Trusts and Trustees, sec. 132.

In *Vidal v. Girard's Ex'rs*, 2 How. 188, Justice Story said: "It is true that if the trust be repugnant to or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it, but that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court possessing equity jurisdiction to enforce and perform the object of the trust." This will be sufficiently obvious upon an examination of the authorities, but a single case may suffice. In *Sonley v. Clockmakers' Co.*, 1 Brown Ch. 81, there was a devise of freehold estate to the testator's wife for life, with remainder to his brother C. in tail male, with remainder to the Clockmakers' Company, in trust, to sell for the benefit of testator's nephews and nieces. The devise, being to a corporation, was, by the English statute of wills, void, that statute prohibiting devises to corporations, and the question was, whether, the devise being so void, the heir at law took beneficially or subject to the trust. Mr. Baron Eyre, in his judgment, said "that 'although the devise to the corporation be void at law, yet the trust is sufficiently created to fasten itself upon any estate the law may raise.' This is the ground upon which courts of equity have decreed in cases where no trustee is named."

The objection to the complaint that it is fatally defective in this, that it shows affirmatively that the indenture or deed

of trust was intended to be signed by three parties, and was signed by only two, cannot be sustained.

The signature of the party of the third part formed no element of the consideration for the signature of the other two parties, and they expressly agreed that the indenture should be binding as between them, regardless of the third party.

The appellant insists that the judgment should be reversed, because Margaret H. McDonald is not made a party defendant in this action.

If said Margaret was a resident of the state of California when the answer was filed, we are at a loss to understand why she was not joined as a co-defendant, either upon the application of one of the parties, or upon motion of the court.

In order for appellant to successfully maintain his position, he must show affirmative error; and in this case he has not shown by the record that she was a resident of the state of California, and therefore that the court had the power to order her joined as a defendant.

We are not called upon to determine to what extent Margaret H. McDonald's interests have been adjudicated in this action. Respondent's position is, that owing to the fact that she had notice of the recordation of the indenture in Washington Territory, and also purchased the land from appellant after the commencement of this action, that therefore she is bound in all respects by the judgment, to the same extent as if she were a party defendant.

In this action no *lis pendens* was filed; indeed, it is quite difficult to see how or where one could have been filed, to have had any vitality or effect.

In this state the act of filing a complaint is no notice to the world of the matters contained therein; and said Margaret having no actual or constructive notice of the proceedings at the time she purchased the realty, it is difficult to discern how she is in any worse position by reason of having purchased after the filing of the complaint, than if she had purchased prior to that event.

Again, the fact that she purchased with notice of the indenture of trust did not give the trial court the right or jurisdiction to litigate her title to the land. Appellant, in making a deed to her, undoubtedly repudiated the entire theory of trust, and she probably bought and now holds in hostility to the trust; the question of her title is a matter to be hereafter considered in *locus rei sitæ*.

But aside from all these considerations, how is the defendant injured by the fact of not having the company of this lady as a co-defendant during the progress of the litigation? and if her company, aid, and assistance were necessary to the best welfare of his interests in the cause, why did he not ask the court to have her joined with him?

The court is expressly authorized by statute to make such order in a proper case. What is appellant's cause of complaint? If he has no interest in the subject-matter of this litigation, why did he not file a disclaimer in the lower court, and thus rid himself of the vexations of the law, and thereby escape a judgment against him for costs?

If he has any interests which are affected by the judgment in this cause, he has had his day in court, and was held to be in the wrong. Why should he demand a new trial because a new third party had interests which were not litigated? If the plaintiff has secured a judgment against the wrong party, he has done an idle thing, and his sins rest on his own head.

We think the appellant should not be heard to insist upon a reversal of the judgment upon the last ground considered.

Let the judgment be affirmed.

TRUSTS, ASSENT OF TRUSTEE TO. — To create a valid trust, the assent of the trustee is not necessary: *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 420; *Stone v. King*, 7 R. I. 358; 84 Am. Dec. 557; *Field v. Arrowsmith*, 3 Humph. 442; 39 Am. Dec. 185, and note; *Furman v. Fisher*, 4 Cold. 626; 94 Am. Dec. 210.

TRUST DEED, NECESSITY OF THE SIGNATURE OF TRUSTEE TO. — The trustee need not sign the deed of trust, in order to validate the trust: *Roberts v. Moseley*, 51 Mo. 282; *Flint v. Clinton Co.*, 12 N. H. 432; but the trustee's indorsement of his acceptance of the trust upon the deed of trust will obviate the necessity of a manual delivery of such deed to him: *Ewing v. Buckner*, 76 Iowa, 467.

PARTIES, NON-JOINDER OF — WHEN AND HOW OBJECTION TO, MUST BE TAKEN: See *Donnell v. Walsh*, 33 N. Y. 43; 88 Am. Dec. 361; *Clapp v. Pawtucket Inst. for Sav.*, 15 R. I. 489; 2 Am. St. Rep. 915; *Gerald v. Bates*, 124 Ill. 150; 7 Am. St. Rep. 350; *Coulson v. Wing*, 42 Kan. 507; 16 Am. St. Rep. 503, and note.

DORE v. THORNBURGH.

[90 CALIFORNIA, 64.]

FOREIGN JUDGMENT — PLEADING — RENDITION AND ENTRY OF. — In an action upon a judgment of the queen's bench division of the high court of justice, in England, an averment in the complaint that the plaintiff in the action in which the judgment was rendered signed final judgment for a specified sum in accordance with the terms of an order of said court, "which said judgment was then and there duly given, made, and entered," is sufficient as against a general demurrer.

STATUTE OF LIMITATIONS — FOREIGN JUDGMENTS. — That portion of the statute of limitations limiting the time within which actions may be commenced "upon a contract, obligation, or liability, not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the state," is not applicable to foreign judgments.

ACTION on a foreign judgment. The opinion states the case.

Galpin and Zeigler, for the appellant.

T. I. Bergin, for the respondent.

FITZGERALD, C. This action was commenced by plaintiff on the fourth day of October, 1888, to recover upon a judgment given against the defendant on the ninth day of May, 1885, in the queen's bench division of the high court of justice, in England.

The complaint is demurred to on the grounds,—1. That it does not state facts sufficient to constitute a cause of action; 2. That the alleged cause of action is barred by the provisions of section 339 of the Code of Civil Procedure.

The demurrer was sustained by the court below, and upon plaintiff failing to amend his complaint, judgment final was rendered in favor of defendant. The appeal is taken upon the judgment roll alone.

The objection raised by the first ground of demurrer, that there is no averment in the complaint that the court ever made or gave the alleged judgment, is not well founded. The complaint alleges "that thereafter, to wit, upon the ninth day of May, 1885, the said plaintiffs signed final judgment in the said action for the said sum of £3,920, in accordance with the terms of the said order, and which said judgment was then and there duly given, made, and entered." This allegation we think sufficient as against a general demurrer.

Under the second ground of demurrer, the question presented for our determination is, whether this action, which is

founded upon a judgment rendered by an English tribunal, is barred by the statute of limitations within two years.

Subdivision 1 of section 339 of the Code of Civil Procedure, upon which respondent relies in support of her contention that the action is barred within that time, reads as follows: "1. An action upon a contract, obligation, or liability, not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the state."

That the judgment herein is not such an instrument in writing (*Patten v. Ray*, 4 Cal. 287) is evident from the use here made of the word "executed," which must be construed to apply to the act of the party sought to be charged. But it is a contract in writing in the full sense of the term "contract or obligation" as employed by our statute: *Stuart v. Lander*, 16 Cal. 375; 76 Am. Dec. 538; *Reed v. Eldredge*, 27 Cal. 346; *Wallace v. Eldredge*, 27 Cal. 498; *Bean v. Loryea*, 81 Cal. 152; and, as such, is not embraced in the two years' limitation prescribed by the provisions of that subdivision of the section.

Section 343 of the Code of Civil Procedure ("An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued") was construed by this court, in *Piller v. Southern Pacific R. R. Co.*, 52 Cal. 42 (which was an action for damages for injuries caused by the alleged negligence of the defendant), to apply "to all suits in equity not strictly of concurrent cognizance in law and equity," and that the two years' limitation found in the first clause of the first subdivision of section 339 is applicable to all actions at law not specifically mentioned in other portions of the statute.

In *Lux v. Haggin*, 69 Cal. 269, which was an action for equitable relief, its meaning was extended so as to embrace "all suits in equity as well as at law." And while we do not think that the construction put upon this section was necessary to the decision of either case, we are satisfied with the reasoning and the conclusion reached in the latter, and regard it as the correct interpretation of the intention of the legislature as there expressed. We are therefore of the opinion that this action, which is not specifically provided for by any other section of the statute of limitations, falls within the meaning of section 343; and as it was commenced within the period of time therein prescribed, it follows that the court below erred in sustaining the demurrer.

We advise that the judgment be reversed, with directions to the court below to overrule the demurrer.

FOOTE, C., and VANCLIEF, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to the court below to overrule the demurrer.

FOREIGN JUDGMENTS — COMPLAINT IN ACTIONS UPON. — As to what facts must be averred in the complaint, see *Gunn v. Peake*, 36 Minn. 177; 1 Am. St. Rep. 661; *Jarvis v. Robinson*, 21 Wis. 530; 94 Am. Dec. 560; *Butcher v. Bank*, 2 Kan. 70; 83 Am. Dec. 446, and note; *Ashley v. Laird*, 14 Ind. 222; 77 Am. Dec. 67, and note; *Gebhard v. Garnier*, 12 Bush, 321; 23 Am. Rep. 721. A complaint is sufficient if it states the court in which the judgment was rendered, the place where the court sat, the names of the parties, the date of the rendition, and the sum recovered: *Andrews v. Flack*, 88 Ala. 294. Where relief is sought against a foreign judgment by a bill in equity, the bill must state definitely and fully the claim upon which the judgment was founded and in what respect it is impeachable: *Herbert v. Herbert*, 47 N. J. Eq. 11.

FOREIGN JUDGMENTS — LIMITATIONS OF ACTIONS. — To a suit upon a foreign judgment the statute of limitations may be pleaded: *Williams v. Preston*, 3 J. J. Marsh, 600; 20 Am. Dec. 179; *Packer v. Thompson*, 25 Neb. 688.

LIMITATIONS OF ACTIONS — JUDGMENTS. — A debt due by judgment is not a contract within the statute of limitations of Kentucky: *Dudley v. Lindsey*, 9 B. Mon. 486; 50 Am. Dec. 522; and this rule has been applied in Tennessee to judgments of sister states: *Napier v. Gidiere*, 1 Speers Eq. 215; 40 Am. Dec. 613.

JUDGMENTS, WHEN AND TO WHAT EXTENT MAY BE REGARDED AS CONTRACTS: See Freeman on Judgments, sec. 4; *Stuart v. Lander*, 16 Cal. 372; 76 Am. Dec. 538; *Sprott v. Reil*, 3 Iowa, 489; 56 Am. Dec. 549; *O'Brien v. Young*, 95 N. Y. 428; 47 Am. Rep. 64; *Childs v. Harris Mfg. Co.*, 68 Wis. 231; *Gutta Percha & R. M. Co. v. Houston*, 108 N. Y. 276; 2 Am. St. Rep. 412.

PACIFIC FACTOR COMPANY v. ADLER.

[90 CALIFORNIA, 110.]

CONTRACT VOID AS AGAINST PUBLIC POLICY. — A contract by which a party agrees to give to another the exclusive sale of grain-bags or burlaps, up to a certain specified number, to be under the former's control for a specified period, and agrees to accept for them the average price received by such other party for all grain-bags or burlaps sold by him, said first party agreeing to sell them for a specified commission, and binding himself to sell a specified number of them, is not on its face void as being in restraint of trade or against public policy. But if it be shown that such contract forms part of a scheme to establish a monopoly in grain-bags or burlaps, to the prejudice of the people of the state, the contract will be held void, as opposed to public policy.

PLEADINGS — ANSWER, THOUGH DEFECTIVE, SUFFICIENT TO DEFEAT MOTION TO STRIKE OUT AND FOR JUDGMENT ON PLEADINGS WHEN. — In an action to recover damages for the breach of a contract, where the defendant, in his answer, evidently intends to claim as a defense that such contract formed part of a scheme or plan of the plaintiff to establish a monopoly and prevent competition in the sale of grain-bags throughout the state, this defense is sufficient to defeat a motion to strike out the answer and for judgment on the pleadings, although the answer is defectively stated, and would not have been allowed to stand if attacked by demurrer for failing to state with certainty that the contract was entered into as a part of and in pursuance of such scheme or plan.

DAMAGES — LIQUIDATED DAMAGES FOR BREACH OF CONTRACT CANNOT BE FIXED BY PARTIES WHEN. — A clause in a contract providing that one of the parties thereto shall pay to the other three cents for every grain-bag which he refused or neglected to deliver on demand is void under sections 1670 and 1671 of the Civil Code of California; and the fact that it was understood and agreed between the parties, at the time of making the contract, that it would be impracticable and extremely difficult to fix the actual damages, owing to the nature of the case, will not preclude the court from determining whether or not it would be impracticable and extremely difficult to fix the actual damages. Whether or not a contract is such that from the nature of the case it would be impracticable or extremely difficult to fix the actual damage sustained by a breach thereof, is a question of fact, which is to be determined by the court in each particular case, and not by the arbitrary agreement of the parties.

ACTION to recover damages for breach of contract. The opinion states the case.

H. K. Mitchell, for the appellant.

Naphtaly, Freidenrich, and Ackerman, for the respondent.

GAROUTTE, J. This is an action upon a contract to recover liquidated damages.

The portions of plaintiff's complaint necessary to consider in the decision of this cause are: "That plaintiff is a corporation, incorporated in this state for the purpose of conducting and carrying on the business of buying, selling, and otherwise dealing in goods, wares, and merchandise, either in its own behalf or as agent for others on commission; that on the sixteenth day of May, 1888, in consideration of one dollar, defendant entered into an agreement, in writing, with plaintiff, whereby he agreed to give it (plaintiff) the exclusive sale of all grain-bags or burlaps, amounting to one hundred and eighty-seven thousand five hundred bags, which were or would be under his control prior to January 1, 1889. And defendant further agreed to accept for said bags or burlaps the average price the plaintiff might obtain for all grain-bags

or burlaps it might sell between the date of said contract and January 1, 1889. And in case plaintiff should fail to sell said one hundred and eighty-seven thousand five hundred bags, defendant agreed to accept the sale of a *pro rata* amount of grain-bags or burlaps as one hundred and eighty-seven thousand five hundred is to the entire number of grain-bags and burlaps which plaintiff should sell from this date until the first day of January, 1889. And defendant agreed to deliver to said company, or at their order, whatever number of grain-bags or burlaps, up to one hundred and eighty-seven thousand five hundred, the said company should call on him to deliver between this date and the first day of January, 1889, on payment to him, when such bags were delivered (less one per cent commission), of seven and one half cents for each bag or burlap delivered. And in case defendant should receive more money or deliver more bags or burlaps than his *pro rata* of the whole number sold by plaintiff between this date and the first day of January, 1889, the defendant would refund the excess of money received, and accept other bags in lieu thereof. And defendant agreed not to sell or offer for sale said one hundred and eighty-seven thousand five hundred bags or burlaps to any one other than to the plaintiff or upon its order. And defendant further agreed to pay plaintiff one per cent on all sales of said bags, or any part thereof. And defendant further agreed to pay plaintiff three cents for each bag or burlap which he refused or neglected to deliver on demand, as liquidated damages. And the said plaintiff agreed to sell and draw on defendant, from time to time, as sales were made, as near, in its judgment, as it could determine, a *pro rata* amount of said one hundred and eighty-seven thousand five hundred bags or burlaps as one hundred and eighty-seven thousand five hundred is to the entire number of bags that are placed in its hands for sale between this date and January 1, 1889."

The complaint further alleges that plaintiff, in pursuance of the covenants in said agreement, demanded of said defendant, prior to January 1, 1889, said one hundred and eighty-seven thousand five hundred bags, and defendant, at that time, had said bags in his possession, but neglected and refused to deliver them to plaintiff.

The answer of defendant practically admits the allegations of the complaint, and sets out certain matters in avoidance, as a special defense, to the effect "that plaintiff, through its

boards of directors, about the sixteenth day of May, 1888, devised a scheme to control the sale and supply of all or the greater portion of the grain-bags and burlaps which were then within the state of California, or to arrive prior to January 1, 1889, for the purpose of increasing the price of bags and burlaps, and of limiting the number of dealers from whom such bags could be obtained, and compelling the farmers of this state to purchase said bags from plaintiff, at a price in excess of their real value; that the demand in this state for such bags and burlaps, for the purpose of sacking the grain, amounts annually to between thirty-two million and thirty-five million bags; that plaintiff calculated that the quantity of grain-bags and burlaps which were then within this state, and which were to arrive prior to January 1, 1889, amounted to forty-two million bags, and that if plaintiff could make contracts with the holders and owners of said bags, whereby it could secure the exclusive right of making sales thereof, that thereby competition for the sale of said bags among said owners and dealers would be removed, and the plaintiff would be enabled to fix a larger price therefor, and compel the parties who required said bags to remove the grain raised on the Pacific coast to purchase the same from plaintiff, and pay therefor the price which plaintiff might demand; that in pursuance of said scheme, plaintiff entered into contracts with other holders and owners of grain-bags and burlaps, in all respects similar to the contract made with defendant; that the entire quantity of said grain-bags and burlaps covered by all the contracts of plaintiff aggregated thirty million bags, or thereabouts; that all of said contracts, including the contract with defendant, are contrary to public policy, and void."

The foregoing matters, in addition to others not necessary to note at this time, are set out in detail by defendant. At the trial plaintiff introduced the contract in evidence, and rested.

Defendant made a motion for a nonsuit, which motion was granted. This is an appeal from that judgment.

Appellant insists that his motion to strike out the affirmative matter in the answer should have been granted, and also that the court erred in not granting his motion for judgment upon the pleadings.

The affirmative defense of the answer is defectively pleaded, and should not have been allowed to stand if attacked by demurrer. It fails to allege that the contract under considera-

tion in this cause was entered into as a part of and in pursuance of the scheme or plan set out, and if the contract relied upon by plaintiff to recover formed no part of the general "plan" to make a "corner" of the bag and burlap market of the state, then such plan was outside of the questions involved in this litigation, constituted no defense to this suit, and should have been stricken out as surplusage.

But it is quite apparent from the pleading, taken as a whole, that the defendant intended, by this defense, to claim that the contract embraced in the complaint formed part of this "scheme or plan," and was therefore void, as being against public policy.

A defective pleading cannot be stricken out by reason of its defects upon the ground of surplusage. In this case a demurrer would have been the proper means to have tested the sufficiency of the answer, and the motion to strike out was properly denied.

Without passing upon the question as to whether any of the allegations of the complaint were denied by the answer, we think the affirmative defense relied upon by defendant was sufficient to defeat the motion of plaintiff for judgment upon the pleadings, when considered in the light of the construction just placed upon it.

While it is clear that public policy favors the utmost freedom of contracts within the limits of the law, and requires that business transactions should not be fettered by unnecessary restrictions, yet agreements in restraint of competition, that threaten the public good, entered into with the object and view of controlling, and if necessary suppressing, the supply, and thereby enhancing the price of articles of actual necessity, that embrace in their evil effects all the territory and practically all the people of this great state, become a grave menace to the best interests of the commonwealth, and therefore are opposed to sound public policy. The entire number of bags in the state on the sixteenth day of May, 1888, and which would arrive prior to January 1, 1889, amounted to forty-two millions. The annual demand for bags was thirty-two millions. The plaintiff entered into this "scheme" or "plan" to obtain the control of these forty-two million bags, and in pursuance of said plan, by contract, did actually secure the control of thirty millions of these bags from these owners and holders thereof.

The plaintiff did not purchase the bags; at the same time,

by the rigor of its contract, it prevented the owners from selling them.

It is clear, this "scheme" or "plan" was devised, and these contracts entered into, for the purpose of removing all competition, and thereby compelling the farmers to purchase bags from plaintiff, at a price in excess of their real value.

Plaintiff controlled three fourths of all the bags which were in the state, or which would arrive within the ensuing six months. It held the bag market in its hands, for competition was gone, and the price demanded must be paid. These agreements were not entered into for the purpose of aggregating capital, nor for greater facilities in the conducting of their business, nor for the protection of themselves by a reasonable restraint upon active competitors, but for the purpose of regulating, controlling, and withholding the supply of bags, and thereby to take an unjust advantage of the farmers' necessities, by disposing of the fruits of its unlawful labors at an unreasonable advance in price.

The supreme court of the state of Ohio, in speaking upon this question, said: "The clear tendency of such an agreement is to establish a monopoly and to destroy competition in trade, and for that reason, on grounds of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public": *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 672.

In considering the question as to what is a reasonable restraint of trade, Chief Justice Tyndall, in *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159, used the following language: "We do not see how a better test can be applied to the question than by considering whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interests of the public; whatever is injurious to the interests of the public is void, on the ground of public policy": *Craft v. McConoughy*, 79 Ill. 346; 22 Am. Rep. 171; *Arnot v. Pittston etc. Coal Co.*, 68 N. Y. 558; 23 Am. Rep. 190.

It is difficult to distinguish, upon principle, the case of

Santa Clara etc. Co. v. Hayes, 76 Cal. 387, 9 Am. St. Rep. 211, from the case at bar.

Plaintiff, being a manufacturer of lumber, entered into contracts with various manufacturers of lumber to purchase so many thousand feet from each during the year 1881, and said parties agreed not to manufacture during said time any other lumber to be sold in the four counties where plaintiff was doing business. The sole object and consideration in entering into these contracts was for the purpose of increasing the price of lumber, limiting the supply, and giving the plaintiff control of the lumber market within the territory specified.

Chief Justice Searls, in holding one of the contracts void, said: "With the results naturally flowing from the laws of demand and supply, the courts have nothing to do, but when agreements are resorted to for the purpose of taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities, the courts cannot be successfully invoked, and their execution will be left to the volition of the parties thereto."

After plaintiff had introduced the contract in evidence, and rested, defendant was granted a nonsuit upon two grounds: 1. That no proof of actual damage was offered, and the clause of the contract fixing liquidated damages is void under sections 1670 and 1671 of the Civil Code; 2. That the contract is void, as being in restraint of trade and against public policy.

Section 1670 of the Civil Code provides: "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."

"Sec. 1671. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage."

The allegation of the complaint, that "it was understood and agreed between plaintiff and defendant, at the time of making the contract, that, owing to the nature of the case, it would be impracticable and extremely difficult to fix the actual damage," added no merit to the pleading, and its denial in the answer was unnecessary labor.

Whether a contract is such that "from the nature of the

case" it would be impracticable or extremely difficult to fix the actual damage sustained by a breach thereof is a question of fact, which must be determined in each particular case; and for the purpose of determining this question the court must examine the attendant and surrounding circumstances under which the contract was entered into, as well as the terms of the contract itself. Parties cannot, by their arbitrary agreement, preclude such examination by the court, or avoid the provisions of the statute: *Patent Brick Co. v. Moore*, 75 Cal. 205; *Eva v. McMahon*, 77 Cal. 472.

In the present case we think that when the plaintiff rested, the "nature of the case" as presented by the terms of the contract, and its breach as admitted by the answer, was such that the court could decide as a fact that it was neither extremely difficult nor impracticable to fix the actual damage sustained by the plaintiff by reason of the defendant's breach of the contract. The refusal of the defendant to deliver the bags may have deprived the plaintiff of its commissions for selling, and under certain circumstances it may have suffered other damage, but we can imagine no case where any damage could have resulted to the plaintiff by reason of a breach of this contract, and which the plaintiff would have been entitled to recover in a court of law, where it could be said that it was impracticable or extremely difficult to fix the actual damage.

Is the contract void, as being in restraint of trade and against public policy? This question, when the motion for a nonsuit was made, was to be determined by an examination of the terms of the contract itself.

We have already decided that it was so corrupted by the bad company with which it associated, as set forth in the answer of defendant, as to be beyond the pale of the law at that time; but at an earlier age, when it appears in the complaint, no stain or blemish is found to discolor it.

The plaintiff contracted to sell the bags and burlaps of defendant at a certain commission. Defendant agreed to accept for them the average price it received for all bags it sold; plaintiff had the exclusive sale of the bags, and was bound to sell a certain portion of them.

Standing alone, a total stranger to the "scheme" or "plan" set out in the answer, this contract must be considered good; for no illegal object appears; no transgression of the law is apparent; no public interest is injuriously affected.

It follows, from the foregoing views, that the judgment should be affirmed.

It is so ordered.

CONTRACTS—RESTRAINT OF TRADE. — As to what contracts are void as being in restraint of trade, see *Western Wooden-ware Ass'n v. Starkey*, 84 Mich. 76; 22 Am. St. Rep. 686, and note; note to *Callahan v. Donnelly*, 13 Am. Rep. 173-176; note to *Angier v. Webber*, 92 Am. Dec. 751-765. One may legally purchase another's business under an agreement on the latter's part not to carry on the same business in the same territory: *National B. Co. v. Union H. Co.*, 45 Minn. 272. But all agreements, contracts, and combinations having for their object the establishing of monopolies are void as in restraint of trade and against public policy: *Richardson v. Buhl*, 77 Mich. 632.

CONTRACT, BREACH OF—LIQUIDATED DAMAGES. — For a discussion of the subject of liquidated damages, see extended note to *Williams v. Vance*, 30 Am. Rep. 28-36; extended note to *Graham v. Bickham*, 1 Am. Dec. 331-340. Where it is manifest that ascertaining the actual damages would be a difficult matter, the parties may stipulate in their contract liquidating damages for a breach thereof: *Hamilton v. Overton*, 6 Blackf. 206; 38 Am. Dec. 136; *Cotheal v. Talmage*, 9 N. Y. 551; 61 Am. Dec. 716; *Studabaker v. White*, 31 Ind. 211; 99 Am. Dec. 628.

[IN BANK.]

SWIM v. WILSON.

[90 CALIFORNIA, 126.]

TROVER—CONVERSION BY SELLING STOLEN CERTIFICATES OF STOCK. —

A STOCK-BROKER WHO SELLS certificates of stock received by him for sale from one who stole them is guilty of a conversion of them, and is liable to the true owner of the stock for its value, although the thief, at the time he delivered to him the stock, represented himself to be its owner, and the broker, in good faith, and without notice of the theft, sold the stock and paid to the thief the proceeds of the sale. And in an action to recover the value of such stock, it is no defense that the defendant, in selling the stock, acted as agent for a third person, who claimed to own it, although he acted in good faith, and in ignorance of such third person's want of title.

ACTION to recover value of certain shares of stock. The opinion states the case.

Wilson and Wilson, for the appellant.

Tilden and Tilden, for the respondent.

DE HAVEN, J. The plaintiff was the owner of one hundred shares of stock of a mining corporation, issued to one H. B. Parsons, trustee, and properly indorsed by him. This stock was stolen from plaintiff by an employee in his office, and

delivered for sale to the defendant, who was engaged in the business of buying and selling stocks on commission. At the time of placing the stock in defendant's possession, the thief represented himself as its owner, and the defendant, relying upon this representation, in good faith, and without any notice that the stock was stolen, sold the same in the usual course of business, and subsequently, still without any notice that the person for whom he had acted in making the sale was not the true owner, paid over to him the net proceeds of such sale. Thereafter the plaintiff brought this action to recover the value of said stock, alleging that the defendant had converted the same to his own use, and the facts as above stated appearing, the court in which the action was tried gave judgment against defendant for such value, and from this judgment, and an order refusing him a new trial, the defendant appeals.

It is clear that the defendant's principal did not, by stealing plaintiff's property, acquire any legal right to sell it, and it is equally clear that the defendant, acting for him, and as his agent, did not have any greater right, and his act was therefore wholly unauthorized, and in law was a conversion of plaintiff's property.

"It is no defense to an action of trover that the defendant acted as the agent of another. If the principal is a wrong-doer, the agent is a wrong-doer also. A person is guilty of a conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title": *Kimball v. Billings*, 55 Me. 147; 92 Am. Dec. 581; *Coles v. Clark*, 3 Cush. 399; *Koch v. Branch*, 44 Mo. 542; 100 Am. Dec. 324.

In *Stephens v. Elwell*, 4 Maule & S. 259, this principle was applied where an innocent clerk received goods from an agent of his employer, and forwarded them to such employer abroad, and in rendering his decision on the case presented, Lord Ellenborough uses this language: "The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but, nevertheless, his acts may amount to a conversion; for a person is guilty of conversion who intermeddles with my property, and disposes of it, and it is no

answer that he acted under the authority of another who had himself no authority to dispose of it."

To hold the defendant liable, under the circumstances disclosed here, may seem upon first impression to be a hardship upon him. But it is a matter of every-day experience that one cannot always be perfectly secure from loss in his dealings with others, and the defendant here is only in the position of a person who has trusted to the honesty of another, and has been deceived. He undertook to act as agent for one who, it now appears, was a thief, and, relying on his representations, aided his principal to convert the plaintiff's property into money, and it is no greater hardship to require him to pay to the plaintiff its value than it would be to take the same away from the innocent vendee, who purchased and paid for it. And yet it is universally held that the purchaser of stolen chattels, no matter how innocent or free from negligence in the matter, acquires no title to such property as against the owner; and this rule has been applied in this court to the case of an innocent purchaser of shares of stock: *Barstow v. Savage Min. Co.*, 64 Cal. 388; 49 Am. Rep. 705; *Sherwood v. Meadow Valley Min. Co.*, 50 Cal. 412.

The precise question involved here arose in the case of *Bercich v. Marye*, 9 Nev. 312. In that case, as here, the defendant was a stock-broker who had made a sale of stolen certificates of stock for a stranger, and paid him the proceeds. He was held liable, the court, in the course of its opinion saying: "It is next objected that as the defendant was the innocent agent of the person for whom he received the shares of stock, without knowledge of the felony, no judgment should have been rendered against him. It is well settled that agency is no defense to an action of trover, to which the present action is analogous."

The same conclusion was reached in *Kimball v. Billings*, 55 Me. 147, 92 Am. Dec. 581, the property sold in that case by the agent being stolen government bonds, payable to bearer. The court there said: "Nor is it any defense that the property sold was government bonds payable to bearer. The *bona fide* purchaser of a stolen bond payable to bearer might perhaps defend his title against even the true owner. But there is no rule of law that secures immunity to the agent of the thief in such cases, nor to the agent of one not a *bona fide* holder. . . . The rule of law protecting *bona fide* purchasers of lost or stolen

notes and bonds payable to bearer has never been extended to persons not *bona fide* purchasers, nor to their agents."

Indeed, we discover no difference in principle between the case at bar and that of *Rogers v. Huie*, 1 Cal. 429, 54 Am. Dec. 300, in which case Bennett, J., speaking for the court, said: "An auctioneer who receives and sells stolen property is liable for the conversion to the same extent as any other merchant or individual. This is so both upon principle and authority. Upon principle, there is no reason why he should be exempted from liability. The person to whom he sells, and who has paid the amount of the purchase-money, would be compelled to deliver the property to the true owner or pay him its full value, and there is no more hardship in requiring the auctioneer to account for the value of the goods, than there would be in compelling the right owner to lose them, or the purchaser from the auctioneer to pay for them."

It is true that this same case afterwards came before the court, and it was held, in an opinion reported in *Rogers v. Huie*, 2 Cal. 571, 56 Am. Dec. 363, that an auctioneer who in the regular course of his business receives and sells stolen goods, and pays over the proceeds to the felon without notice that the goods were stolen, is not liable to the true owner as for a conversion. This latter decision, however, cannot be sustained on principle, is opposed to the great weight of authority, and has been practically overruled in the later case of *Cerke v. Waterman*, 63 Cal. 34. In that case the defendants, who were commission merchants, sold a quantity of wheat, supposing it to be the property of one Williams, and paid over to him the proceeds of the sale, before they knew of the claim of the plaintiff in that action. There was no fraud or bad faith, but the court held the defendants there liable for the conversion of the wheat.

It was the duty of the defendant in this case to know for whom he acted, and, unless he was willing to take the chances of loss, he ought to have satisfied himself that his principal was able to save him harmless if in the matter of his agency he incurred a personal liability by the conversion of property not belonging to such principal.

Judgment and order affirmed.

Rehearing denied.

CONVERSION, WHAT CONSTITUTES. — Both he who sells personalty without authority, and the one to whom such property is sold, are guilty of

conversion: Note to *Bolling v. Kirby*, 24 Am. St. Rep. 797, 798; *Velsian v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 184. A broker purchasing property from one who has no title, for value, and shipping it to his principal, is liable in trover to the true owner: *Williams v. Merle*, 11 Wend. 80; 25 Am. Dec. 604. A person is guilty of conversion who sells property of another without the owner's consent, even though he acts as the agent of one who claims to be owner, and is ignorant of his principal's want of authority: *Kimball v. Billings*, 55 Me. 147; 92 Am. Dec. 581. The purchaser in good faith of stolen goods is liable in trover to the owner, if he sold them subsequently: *Courtis v. Cane*, 32 Vt. 232; 76 Am. Dec. 174. But see *Spooner v. Holmes*, 102 Mass. 503; 3 Am. Rep. 491.

[IN BANK.]

CURTISS v. ÆTNA LIFE INSURANCE COMPANY.

[90 CALIFORNIA, 245.]

INSURABLE INTEREST — DEBT, THOUGH BARRED BY STATUTE OF LIMITATIONS, GIVES, IN LIFE OF DEBTOR. — A debt, even though not legally collectible by reason of the bar of the statute of limitations, gives to the creditor an insurable interest in the life of his debtor.

STATUTE OF LIMITATIONS, RUNNING OF, NOT PRESUMED FROM ALLEGATION IN PLEADING WHEN. — An allegation in a pleading showing money to have been loaned at a date sufficiently remote to admit of the running of the statute of limitations raises no presumption that the statute has run. But when the allegation is consistent with the opposite conclusion, — that is, that the debt is not barred, — the defense must be raised by plea.

INSURABLE INTEREST — CONTRACT TO ADVANCE MONEY TO PERSON GIVES, IN HIS LIFE. — A binding contract by one person to advance money to another on demand gives to the former an insurable interest in the life of the latter. And if such an agreement, to be valid, must be in writing, an allegation in a pleading that alleges that it was so agreed must be held to imply that it was so agreed in writing.

INSURANCE POLICY — ASSIGNMENT AS COLLATERAL SECURITY TO ONE HAVING NO INSURABLE INTEREST. — A policy of life insurance issued to a creditor of the assured may be assigned by such creditor as collateral security, and the assignee may enforce payment of the policy, although at the time of the assignment he had no insurable interest in the life of the assured, and notwithstanding the policy expressly provides that any claim made by an assignee shall be subject to proof of interest. An assignment as collateral security does not come within the meaning of such provision. The assignee in such case is a mere trustee for the assured.

INSURANCE POLICY IS INSTRUMENT IN WRITING EXECUTED IN THIS STATE WHEN. — A policy of life insurance issued by an insurance company of another state, which expressly provides that it shall not be operative until countersigned by the general agent of the company in this state, and which is so countersigned, is a written contract executed in this state within the meaning of the statute of limitations.

INSURANCE COMPANY ESTOPPED FROM ALLEGING MISREPRESENTATION AS TO INSURABLE INTEREST WHEN. — Although it does not appear that the creditor of a person whose life is insured was, at the date of the policy, bound by a written contract to advance the amount of the policy, if it does appear that future advances were promised, that the person whose life was insured had made a written acknowledgment of a considerable subsisting indebtedness, that a full and correct statement of all the facts as they existed was made to the company's agent, that the company continued to receive the premiums with knowledge of the facts, and that the full amount of the policy was finally advanced by the creditor, the company will be estopped from alleging a misrepresentation of an insurable interest to the full amount of the policy.

INSURABLE INTEREST — WHETHER ASSIGNEE HAS, IMMATERIAL AFTER LOSS. — After a loss and fixed liability have attached upon a policy of life insurance, it is of no concern whatever whether an assignee has or has not an interest in the life insured.

PRACTICE — AMENDMENT OF COMPLAINT DURING TRIAL CURES ERROR WHEN. — Where evidence, immaterial when admitted, is rendered material by an amendment of the complaint during the trial, the error is cured.

ACTION upon a policy of life insurance. The opinion states the case.

Fox and Kellogg, for the appellant.

Charles F. Hanlon, for the respondent.

BEATTY, C. J. These are separate appeals in the same case; the first from the judgment, and the second from an order denying a new trial.

The action is by the assignee of a policy of life insurance effected by his assignor upon the life of a third person, and the principal grounds upon which it is defended are, want of interest in the insured at the date of the policy, and in plaintiff at the date of the assignment. The points involved in these and other grounds of defense are raised by demurrer to the complaint, motion for nonsuit, and by numerous exceptions to the admission and exclusion of evidence, and to the allowance and refusal of instructions to the jury.

It is scarcely practicable to notice each separate exception contained in the record and referred to in the briefs, but we shall endeavor not to overlook anything essential to a proper consideration of the merits of the appeals.

First, then, as to the points raised by the demurrer.

It appears from the complaint as amended that the policy was issued April 5, 1871, to Esther C. Curtiss, for the sum of ten thousand dollars, on the life of one Tucker; and with respect to her interest in Tucker's life, it is alleged "that at the time said application was made, the said Esther Cordelia

Curtiss had an insurable interest in the life of Alfred W. Tucker, which interest was as follows: The said Tucker at the time was indebted to the said Esther C. Curtiss in the full sum of four thousand dollars, for so much money which she had before that time, to wit, in the year 1866, loaned to the said Tucker in United States gold coin, at his special instance and request; the whole of which, together with the interest thereon from the time of said loan, was due and unpaid on said last-mentioned date; and was also on said last-mentioned date further indebted to the said Esther C. Curtiss in the sum of five hundred dollars, or thereabouts, for so much money before that time, and since the year 1866, paid, laid out, and expended for and on account of the said Tucker by the said Esther C. Curtiss, at his special instance and request, together with the interest thereon. And on the day application was made as aforesaid, and immediately prior to the making of the same, the said Esther C. Curtiss, for valuable consideration, agreed with the said Tucker to loan and advance money thereafter at such times as he might demand till the amounts so loaned and advanced, in the aggregate, and the interest thereon, together with other sums so due as aforesaid, and the interest thereon, should amount to the total sum of ten thousand dollars. And plaintiff avers, on his information and belief, that afterward, to wit, subsequently to the making of said application and the issuance of said policy, and in pursuance of said agreement between the said Esther C. Curtiss and the said Tucker, she, the said Esther C. Curtiss, at various times loaned and advanced to said Tucker various sums of money, which, together with the interest thereon, and the said sums of four thousand dollars, and five hundred dollars, and the interest due thereon, amounted in all to the sum of ten thousand dollars, and the whole of which was unpaid and due from said Tucker to said Esther C. Curtiss at the time of his death as herein stated, and no part of which has ever been paid. All of which was communicated to and known by the defendant at the time said application was made, and before and at the time of the issuance of the said policy."

Appellant contends that these allegations disclose no insurable interest in Mrs. Curtiss within the meaning of section 2763 of the Civil Code.

It is to be observed, however, that at the date of the policy the Civil Code had not been enacted; and the question is, not

whether the policy is obnoxious to the provision referred to, but whether it was rendered invalid by any rule or principle of the common law. There may be no difference between the two; and indeed it may be allowed that the code provision is an indication of what, in the opinion of the legislature, the common-law rule was; but if there is a difference, it is by the common law, and not by the code, that the validity of the policy must be tested.

Bearing this in mind, we proceed to consider the specific objections of counsel for appellant to the statement of Mrs. Curtiss's interest.

He claims that it appears from the allegations of the complaint that her right to recover the four thousand dollars loaned in 1866, and the five hundred dollars advanced after 1866, was, at the date of the policy, barred by the statute of limitations, and consequently that Tucker was under no legal obligation to repay any part of these sums or of the interest thereon; and he contends that the alleged agreement to advance other money, sufficient, with the sums previously advanced, to amount to ten thousand dollars, was void under the statute of frauds, because, presumably, it was not in writing, and not to be performed within one year.

As to the first proposition, the cases seem to hold that a debt, even though not legally collectible by reason of the bar of the statute, gives an insurable interest: 1 May on Insurance, sec. 108; Bliss on Life Insurance, sec. 28, and cases cited. But, aside from this, we think it does not appear from the complaint itself that at the date of the policy the obligations of Tucker to Mrs. Curtiss were barred by the statute. The case of *Dorland v. Dorland*, 66 Cal. 189, cited by counsel, is not in point. It was merely held in that case as a rule of evidence that an advance of money being proved, and no time for repayment mentioned, the presumption is, that it is payable on demand, and that the statute begins to run immediately. Here, however, the question is as to a rule of pleading, and we do not understand that a complaint showing money to have been loaned at a date sufficiently remote to admit of the running of the statute raises a presumption that it has run. On the contrary, when the allegation is consistent with the opposite conclusion, i. e., that the debt is not barred, the defense must be raised by plea: *Kraner v. Halsey*, 82 Cal. 210; *Doe v. Sanger*, 78 Cal. 151; *Wise v. Hogan*, 77 Cal. 187, and cases cited. Here the allegation that Tucker became

indebted more than four years prior to the date of the policy is entirely consistent with the fact of an original promise in writing to pay at a date within four years, or with a written acknowledgment of the debt, subsequently made, and an express or implied promise to pay it.

As to the proposition that the agreement of Mrs. Curtiss to advance other moneys was void, the rule of pleading is also against the contention of appellant. If the agreement, to be valid, must have been in writing, then the allegation that it was so agreed is held to imply that it was so agreed in writing: *Broder v. Conklin*, 77 Cal. 336, and cases cited.

So far, then, as the complaint is concerned, it clearly shows an indebtedness from Tucker to Mrs. Curtiss, at the date of the policy, amounting to four thousand five hundred dollars, exclusive of interest, and to that extent there can be no question that it shows her to have had an insurable interest in his life.

But did she have any interest beyond the amount of the then existing indebtedness? In other words, did her agreement to advance Tucker, on his demand, the balance of ten thousand dollars create an additional interest?

It has been held that a surety on an official bond has an insurable interest in the life of his principal, although there has been no breach of the bond at the date of the application for the policy; and that he may recover the full amount of the sum insured, although no breach of the bond has ensued: *Scott v. Dickson*, 108 Pa. St. 6; 56 Am. Rep. 192. This conclusion was based upon the ground that the contingent liability of a surety brings him within the common law principle that the only thing essential to relieve the policy of the character of a gaming or wagering contract is, "that it shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the assured has no interest"; citing *Connecticut Life Ins. Co. v. Schaefer*, 94 U. S. 457. Upon the same principle, it must have been held at common law that a binding contract by Mrs. Curtiss to advance money to Tucker, on his demand, gave her an insurable interest in his life.

We come next to the question whether the complaint was bad because of a failure to allege that plaintiff, at the date of the assignment to him, had an insurable interest in the life of Tucker.

The allegation of the complaint is, that on the twelfth day

of January, 1880, said Esther C. Curtiss, for a valuable consideration, to wit, the sum of ten thousand dollars and upwards, and in accordance with the terms of said policy, assigned, etc., to plaintiff; and a copy of the assignment, attached as an exhibit to the complaint, is referred to and made a part thereof. Referring to the assignment, it appears from its terms to have been made as collateral. There may be some ambiguity or uncertainty about the meaning of this allegation, construed with reference to the terms of the assignment as set out in the exhibit, but no such objection was specified in the demurrer, and upon a general demurrer we think the complaint must be held to allege an assignment of the policy as collateral security for the repayment of ten thousand dollars and upwards advanced by plaintiff to the assured.

So far as it is affected by the law of this state as it existed at the date of the assignment, there can be no doubt of the validity of the transfer. By section 2764 of the Civil Code it is provided that "a policy of insurance on life or health may pass by transfer, will, or succession to any person, whether he has an insurable interest or not, and such person may recover upon it whatever the insured might have recovered." It may be, however, notwithstanding this provision, that the parties to a life policy can make a valid stipulation against an assignment to one who has no insurable interest in the life insured; but whether they could or not, we have no doubt that such a stipulation in a policy issued, as this policy was, before the enactment of the code remains of binding force. It is necessary, therefore, to consider the terms of the policy in disposing of this point.

By its express terms the amount insured is made payable "to Esther C. Curtiss, her executors, administrators, or assigns, within ninety days after notice and proof of the death of the insured, etc."; but it is, in another clause, provided that any claim "made by any assignee shall be subject to proof of interest."

Does this proviso apply to an assignee who holds the policy merely as collateral security for the repayment of money advanced to or for the insured? We hold that it does not.

The law against assignments to parties without interest (where such is the law), and stipulations against such assignments, are based upon the same motives and policy, and neither one nor the other applies to assignments by way of security. The assignee in such case is a mere trustee for the

insured. What he collects on the policy he collects for him, and must apply it to the payment of the debt secured, accounting for any surplus. So regarded, such assignments do not involve the mischief which the common law or the contract of the parties was designed to prevent, and are consequently not within the meaning of the proviso in this policy. In the case of *Warnock v. Davis*, 104 U. S. 775, where it was held that an assignment to one who had no insurable interest was invalid in other respects, the assignee was nevertheless allowed the advances for which the policy was security. The principle of that decision sustains our conclusion on this point.

It was not necessary, therefore, that the plaintiff should allege any interest in the life of Tucker. If it was necessary that he should allege an indebtedness from the insured to him, we think the fact was sufficiently alleged as against a general demurrer; and if it was necessary to allege preliminary proof to defendant of such indebtedness, we think that allegation is comprised in the general allegation that "all conditions on the part of E. C. Curtiss and plaintiff have been performed."

The demurrer to the complaint was properly overruled, and this conclusion disposes of the appeal from the judgment, which is accordingly affirmed.

With respect to the appeal from the order denying a new trial, it is clear, if our conclusions above stated are correct, that the superior court did not err in overruling defendant's objection to the admission of any testimony in support of the complaint.

Nor did the superior court err in overruling the motion for a nonsuit.

Only one of the grounds of this motion remains to be noticed, the others being disposed of by what has already been said.

This action was commenced more than two years after the liability of defendant accrued, and if the policy was executed out of this state, the right of action was barred by section 339 of the Code of Civil Procedure.

The complaint alleges that the policy, a copy of which is made part thereof, was executed in California, April 5, 1871. The answer admits the genuineness and due execution of the policy, a copy of which is annexed to the complaint, but denies that it was executed in California, alleging, on the

contrary, that it was executed in Connecticut on the 14th of March, 1871, and pleading the bar of the statute.

The plaintiff did not introduce the policy in evidence at the trial, and the contention of the defendant is, that he therefore did not prove a policy executed in California, and consequently that he should have been nonsuited on the plea of the statute of limitations.

But even if we admitted that with respect to this plea the burden of proof was on the plaintiff, — which we do not, — the contention of defendant could not be sustained.

The last clause of the policy was in these words: "In witness whereof, the said Ætna Life Insurance Company have, by their president and secretary, signed and executed this contract in the city of Hartford this fourteenth day of March, 1871, but the same shall not be operative until countersigned by M. P. Morse, general agent at San Francisco, California"; following which came the signatures, "E. A. Bulkeley, President; T. O. Center, Secretary"; and then the following: "Countersigned at San Francisco this fifth day of April, 1871. M. P. Morse, General Agent."

All this appeared by the copy set out in the complaint, the correctness of which was expressly admitted by the answer. It appeared, therefore, on the face of the pleadings, that the policy, although partly executed at Hartford, on March 14th, was not fully executed or operative until countersigned, some time afterward, by the general agent at San Francisco. The plaintiff also testified at the trial that Morse countersigned the policy at San Francisco after it was returned from Connecticut, and this testimony was admitted without objection. The motion for a nonsuit was properly denied.

There are numerous specifications of particulars in which the evidence is insufficient to support the verdict of the jury, as to which we say that it appears very plainly from the testimony that the procuring of the policy in question by Mrs. Curtiss was a perfectly honest and legitimate transaction. She had advanced large sums to Tucker, and there is very satisfactory evidence that shortly before the issuance of the policy, Tucker, in applying for an additional advance, had distinctly acknowledged, in writing subscribed by him, an existing indebtedness of between five and six thousand dollars, and this acknowledgment was not qualified by any promise to pay upon a contingency, as in *Curtis v. Sacramento*, 70 Cal. 414, or by any declaration inconsistent with

an intention to pay. It does not appear that Mrs. Curtiss was, at the date of the policy, bound by any contract in writing to advance Tucker the balance of the ten thousand dollars, but she had promised advances to a considerable amount, and there is evidence that she made them. It also appears that her written answers to questions contained in or accompanying her application for the policy were filled in by the agent of defendant, after a full and correct statement of all the facts as they existed. This is clearly and distinctly proved by the testimony of the agent who took the application. With this knowledge, which must be imputed to the company, it issued the policy, and continued to receive the premiums during the lifetime of Tucker, i. e., for a period of nine years, during which time Mrs. Curtiss, on the faith of the policy, made advances which, with the old debt and interest accruing, must have exceeded ten thousand dollars. Under these circumstances, we think it does not lie in the mouth of the defendant to charge her with misrepresentation in stating in her application that she had an insurable interest to the full amount of the policy, although, as matter of strict law, her interest at that time may not have amounted to so much. Her interest was, we think, sufficiently proven to sustain the verdict.

As to the alleged failure to prove an insurable interest in plaintiff at the date of the assignment, we have shown that none is required to support an assignment by way of collateral security.

It was clearly proved that Mrs. Curtiss was largely indebted to plaintiff at the time of the assignment, at the time of Tucker's death, when the policy became payable, and at the time of her own death. This gave plaintiff a right of action on the policy, and all the questions which defendant attempts to raise about the payment or release of the indebtedness from Mrs. Curtiss to plaintiff, subsequent to the time when the loss became payable, are out of place here. Those are questions which can only arise between plaintiff and the heirs or other representatives of Mrs. Curtiss, they alone being concerned in a proper application or distribution of the proceeds of the policy. After a loss and fixed liability attached, it is of no concern whatever to the insurer whether an assignee has or has not an interest in the life insured.

As to the alleged errors of law, many of them are disposed of by what has already been said.

Some evidence admitted against the objection of defendant was immaterial at the time it was so admitted, but the complaint was subsequently amended before the close of the trial, so as to make this evidence material. This cured the error.

We find no material error in the instructions upon which the case was submitted to the jury, except that they are in some respects too favorable to the defendant.

Judgment and order affirmed.

Rehearing denied.

LIFE INSURANCE — INSURABLE INTEREST — DEBTOR AND CREDITOR — STATUTE OF LIMITATIONS. — A creditor has an insurable interest in his debtor sufficient to sustain an insurance policy, even though the debt be barred by the statute of limitations: *Rawls v. American etc. Ins. Co.*, 27 N. Y. 282; 84 Am. Dec. 280, and note; *Rittler v. Smith*, 70 Md. 261.

LIFE INSURANCE. — INSURABLE INTEREST ARISING BY CONTRACT: See note to *Morrell v. Trenton Ins. Co.*, 57 Am. Dec. 97; also note to *Shaw v. Etna Ins. Co.*, 8 Am. Rep. 152. An interest held under an executory contract for conveyance is a valid subject of insurance: *Gilman v. Ins. Co.*, 81 Me. 488. See *Stokes v. Amerman*, 121 N. Y. 337.

LIFE INSURANCE — ASSIGNABILITY OF POLICY TO ONE HAVING NO INSURABLE INTEREST. — A policy on one's life may be effectually assigned by him to any person having no insurable interest in his life: *Bursinger v. Bank*, 67 Wis. 75; 58 Am. Rep. 848, and extended note. See also extended note to *Currier v. Continental etc. Ins. Co.*, 52 Am. Rep. 142; extended note to *Singleton v. St. Louis Ins. Co.*, 27 Am. Rep. 327; note to *Morrell v. Trenton Ins. Co.*, 57 Am. Dec. 103. Any one may take an insurance policy on his life and make a valid assignment of it, notwithstanding the fact that the assignees have no insurable interest in his life: *Milner v. Bowman*, 119 Ind. 448; *Brennan v. Franey*, 142 Pa. St. 301; *Souder v. Home etc. Society*, 72 Md. 511; *Lenig v. Eisenhart*, 127 Pa. St. 60; *contra*, see *Roller v. Moore*, 86 Va. 512.

LIFE INSURANCE — RIGHT OF COMPANY TO QUESTION INSURABLE INTEREST OF BENEFICIARY. — An insurance company cannot urge a want of insurable interest in the beneficiary as a defense to an action on the policy: *Pacific etc. Ins. Co. v. Williams*, 79 Tex. 633.

EASTON v. MONTGOMERY.

[90 CALIFORNIA, 307.]

STATUTE OF FRAUDS — RECEIPT GIVEN BY VENDOR OF LAND IS CONTRACT FOR SALE OF LAND WHEN. — A memorandum signed by a vendor of land, acknowledging the receipt of a certain sum of money as a deposit and part payment on account of a sale of certain land therein described, for a price specified, and providing that the deposit shall be forfeited if the further payments of purchase-money therein specified are not made, and that it shall be returned to the purchaser if the title prove to be defective, is not an agreement for the purchase of an option, but is a contract for the sale of lands.

STATUTE OF FRAUDS — MEMORANDUM OF SALE OF LAND SUFFICIENT TO SATISFY. — A memorandum signed by a vendor of land acknowledging the receipt of a deposit on account of the purchase price satisfies the statute of frauds, although it is not signed by the purchaser; and its execution and delivery by the vendor to the vendee are a sufficient consideration to support a promise on the part of the latter to pay the money therein named as the price of the land.

VENDOR AND PURCHASER — EXAMINATION OF TITLE TO LAND, REASONABLE TIME FOR, IMPLIED WHEN. — Where a memorandum of the sale of land provides for the "title to prove good, or no sale, and this deposit to be returned," but specifies no time within which the examination of the title is to be made, a reasonable time is implied.

VENDOR AND PURCHASER — ABSTRACT OF TITLE TO LAND, PURCHASER BOUND TO PROVIDE. — Where the parties to a contract for the sale of land do not agree that the condition of the title shall be ascertained from any particular abstract, nor from an abstract to be furnished by the vendor, it is incumbent upon the purchaser to provide the abstract, and to satisfy himself as to the condition of the title.

DEFECTS IN TITLE TO LAND, DUTY OF PURCHASER TO POINT OUT. — A purchaser who undertakes to examine the title to land for the purpose of determining whether it is good or not is bound to make a complete examination thereof, and to point out the defects, if any, to the vendor, who, in the absence of any time fixed by agreement, will then have a reasonable time within which to remove those defects, and if the vendor fails within such time to remedy the defects thus pointed out, the purchaser, in any action to recover the purchase-money or deposit paid by him upon the ground that the title is defective, is limited to such defects as were then pointed out.

VENDOR AND PURCHASER — CONDITION THAT VENDOR'S TITLE IS GOOD IMPLIED IN CONTRACT FOR SALE OF LAND. — In every executory contract for the sale of land there is an implied condition that the title of the vendor is good, and that he will transfer to the purchaser, by his deed of conveyance, a title unencumbered and without defect. This condition is, however, sufficiently complied with if he is able to give a good title at the time when, by the terms of his contract of sale, he is called upon to make a conveyance, and he has no right to recover back the deposit paid by him, merely because the vendor's title was defective at the date of the contract.

VENDOR OF LAND NEED NOT BE ABSOLUTE OWNER WHEN HE CONTRACTS TO SELL IT. — It is not necessary that a vendor of land be the absolute owner thereof at the time when he enters into an agreement to sell it. If the agreement is made by him in good faith, and he has at the time such an interest in the land, or is so situated in reference thereto, that he can carry into effect the agreement on his part at the time when he has agreed so to do, it will be upheld.

VENDOR AND PURCHASER — DEPOSIT ON SALE OF LAND, ACTION TO RECOVER, WHEN ONLY MAINTAINABLE. — It is only when the vendor of land is guilty of fraud, either at the time of entering into the contract of sale knowing that it was out of his power to perform it, or by his subsequent acts in putting it out of his power to perform, that the purchaser is entitled to treat the contract as rescinded, and to bring his action to recover the deposit.

VENDOR AND PURCHASER — VENDEE OF LAND NOT ENTITLED TO CONVEYANCE UNTIL FULL PAYMENT OF PURCHASE-MONEY. — The general rule is, that the purchaser of land is not entitled to a conveyance until full payment of the purchase-money, and that the acts of payment and conveyance being mutual and dependent, neither party is in default until after tender and demand by the other.

VENDOR AND PURCHASER — PURCHASER OF LAND NOT ENTITLED TO RESCIND CONTRACT OF SALE CANNOT MAINTAIN ACTION TO RECOVER DEPOSIT. — A purchaser of land cannot maintain an action upon a contract of sale which he has no right to rescind, without full performance on his part prior to the default of the vendor; and without alleging or proving such performance, he cannot maintain an action to recover purchase-money paid in part performance of his contract, while it is still in existence and uncompleted.

ACTION to recover a deposit made on a sale of real estate.
The opinion states the case.

Olney, Chickering, and Thomas, for the appellants.

T. C. Van Ness and John J. Roche, for the respondent.

HARRISON, J. During the month of August, 1887, there was great excitement in the real estate market in the county of Santa Clara, popularly known as a "boom." This excitement subsided at about the end of that month, and thereafter it became much more difficult to sell real estate in that county. During this period, viz., August 15, 1887, one A. H. Albers, who was the owner of the tract of land described in the instrument hereinafter set forth, made a contract with the defendants, Montgomery and Rea, for the sale of the tract to them for the sum of twenty-nine thousand dollars, of which they paid him one thousand dollars as a part payment, and were to pay the remainder on or before January 1, 1888. Montgomery and Rea were real estate brokers, and were acting in this matter as the agents of the defendant Chase, and the money which they then paid to Albers as part payment upon said purchase had been previously placed in their hands by Chase for the purpose of investing in real estate as a speculation. They took the contract in their own names, for the reason that it was uncertain whether Chase would approve the purchase. Chase, however, did approve the purchase as soon as informed thereof, and prior to the twentieth day of August. On the twentieth day of August, 1887, one Lawrence, as the agent of the plaintiff, and acting in his behalf, entered into negotiations with Montgomery and Rea for the purchase of this tract of land, and after being informed of the nature of the interest therein held by Chase, agreed with them

upon the terms of purchase, and thereafter, upon the same day, in pursuance of said agreement, the plaintiff paid to Montgomery and Rea the sum of five hundred dollars, and received from them the following instrument:—

“Received, San José, August 20, 1887, from George Easton, by Lawrence, the sum of (\$500) five hundred dollars, in gold coin, being a deposit and part payment on account of bargain and sale made to h—— this day, to a certain lot, tract, or parcel of land lying, situate, and being in the county of Santa Clara, state of California, and bounded and described as follows: Being 187 acres, known as Albers Place, situate on Albers road, bounded on the east by Albers road, and on the south by Storey road, said farm having been sold to said Easton this day for the sum of (\$46,750) forty-six thousand seven hundred and fifty dollars, in gold coin, the balance to be paid as follows: Forty-five hundred dollars on or before Monday, August 22, at one o'clock, p. m., one third of purchase price within thirty days, and balance on or before two years, at seven per cent from date, or this deposit to be forfeited without recourse. Title to prove good, or no sale, and this deposit to be returned. The said deposit is to remain in the hands of Montgomery and Rea, the agents making this sale, until the title passes. And they are authorized to return the same to the buyer if the title is defective.

“C. M. CHASE,

“By MONTGOMERY AND REA, Real Estate Agents.”

August 22, 1887, the plaintiff paid the sum of \$4,500, named in the instrument to be paid on that day, and on September 19, 1887, he paid the further sum of \$666.67, and delivered to Montgomery and Rea a note of Lawrence for \$333.33, for which he received from them the following instrument:—

“\$1,000.

SAN JOSÉ, Sept. 19, 1887.

“Received from George Easton, by Lawrence and Lyons, one thousand dollars, in consideration of which the time for payment on the rancho Coronado is extended thirty days. The above payment is on account of the purchase price.

“C. M. CHASE,

“By MONTGOMERY AND REA.”

Thereafter the plaintiff commenced this action to recover from the defendants the amount of money so paid by him, and for a cancellation of the note of Lawrence. The transcript

does not show the date at which action was commenced, but alleges that prior thereto, viz., September 28, 1887, he demanded from the defendants a return of the money and of the note, which was refused.

The instrument above set forth is not an agreement for the purchase of an option, but is a contract for the sale of lands: *Benson v. Shotwell*, 87 Cal. 49. It is more in the nature of a memorandum to satisfy the statute of frauds, than a contract embracing all of the terms of the agreement between the parties. Being signed by Chase, it satisfies the statute of frauds so far as to be capable of enforcement against him, and its execution by him and delivery to the plaintiff is a sufficient consideration for the support of a promise on the part of the plaintiff to pay the money therein named as the price of the land: *Cavanaugh v. Casselman*, 88 Cal. 543. There is no mention in it of the time at which a conveyance of the land is to be made, or within which an examination of the title is to be had. Ordinarily, parties entering into an executory agreement for the purchase and sale of real estate make provision therein, in these respects, specifying the time allowed for examination of the title, for furnishing abstract, making report of defects and objections, specifying the time within which the vendor may thereafter make his title good, and the character of the conveyance to be executed by him; but in the haste attendant upon the excitement of a "boom," these formal provisions are frequently omitted, and the construction of the contract is left to implication or established rules.

It is evident from the provision inserted in the memorandum, "title to prove good, or no sale, and this deposit to be returned," that it was contemplated by the parties that an examination of the title was to be made on behalf of the plaintiff, and that upon such examination it might be found defective. As no time was specified within which such examination should be made, a reasonable time therefor was implied: *Allen v. Atkinson*, 21 Mich. 351. The parties did not agree that the condition of the title should be ascertained from any particular abstract, or from an abstract to be furnished by Chase, and in this respect the case is distinguishable from *Smith v. Taylor*, 82 Cal. 533, and from *Boas v. Farrington*, 85 Cal. 535. The agreement being silent upon this point, it was incumbent upon the plaintiff to provide the abstract, and to satisfy himself as to the condition of the title: *Carr v. Roach*, 2 Duer, 20; *Espy v. Anderson*, 14 Pa. St. 312.

He was not at liberty, however, to pronounce the title defective without any examination, or upon a partial examination. Having assumed to examine the title for the purpose of determining whether it was good, it was incumbent upon him to make a complete examination thereof. He could call upon the defendants for any information with reference thereto, and it then became their duty to furnish such information as they possessed: *Benson v. Shotwell*, 87 Cal. 49. If, upon such examination, it appeared to him that the title was defective, it then became his duty to report to the vendor the particulars wherein such defects were claimed to exist, and in the absence of any time fixed by the agreement within which the vendor should remove these defects, or satisfy his objections, a reasonable time would be allowed therefor: *More v. Smedburgh*, 8 Paige, 600. The burden is on the vendee to point out the defects in the title: *Dwight v. Cutler*, 3 Mich. 566; 64 Am. Dec. 105. If the vendor fails within such time to remedy the defects thus pointed out, the purchaser, in any action to recover the purchase-money or deposit paid by him upon the ground that the title is defective, is limited to such defects as were then pointed out: 1 Chitty on Contracts, 434; *Todd v. Hoggart*, M. & M. 128.

It does not appear whether the plaintiff caused any examination of the title to be made, except that Montgomery, in his testimony, says that in October, long after the demand for the return of the deposit, "we received a letter from Mr. Easton, and another one from his attorney, saying that the title was imperfect." There is no evidence in the record that the particulars in which the title was imperfect were called to the attention of the defendants, or that any demand was ever made upon Chase to remedy these defects, prior to making the demand for the return of the deposit, or prior to the commencement of the action.

The plaintiff contends, however, that, inasmuch as at the date of the instrument Chase's title to the land was defective, the clause in the instrument, "and they are authorized to return the same to the buyer if the title is defective," gave him an immediate right of action to recover the deposit, which he can enforce at any time thereafter. This principle, contended for by the plaintiff, would be equally applicable to a title with any encumbrance or any defect, however slight or however easily removed. We do not, however, construe this clause as conferring such right. In every executory contract for the

sale of land, there is an implied condition that the title of the vendor is good, and that he will transfer to the vendee, by his deed of conveyance, a title unencumbered and without defect: *Burwell v. Jackson*, 9 N. Y. 535; *Pomeroy v. Drury*, 14 Barb. 418; *Innes v. Willis*, 48 N. Y. Sup. Ct. 192; *Dwight v. Cutler*, 3 Mich. 566; 64 Am. Dec. 105; Warvelle on Abstracts, 293.

The money left with Montgomery and Rea, by the plaintiff, as a deposit, was a part payment on account of the purchase by him of the land, and was not given upon the consideration that Chase then had a good title to the land purchased, but upon the consideration that the plaintiff would receive from him a good title thereto at the time when, by the terms of the agreement, he should be called upon to make a conveyance. The "defective" condition of the title referred to in the last clause of the instrument is "pointed only at incurable defects in the title, and not to such imperfections as are capable of being removed after the agreement is made, and whilst the title is under investigation": *Stowell v. Robinson*, 5 Scott, 211. "The object of this clause evidently is to avoid disputes about the title, and while it is being adjusted the purchaser keeps his money for other operations. The same with the vendor; he is unable to find another purchaser if his first vendee is dissatisfied with the title": *Brizzolara v. Mosher*, 71 Ill. 41.

It is not necessary, however, that the vendor should be the absolute owner of the property at the time he enters into the agreement of sale. An equitable estate in land, or a right to become the owner of the land, is as much the subject of sale as is the land itself, and whenever one is so situated with reference to a tract of land that he can acquire the title thereto, either by the voluntary act of the parties holding the title, or by proceedings at law or in equity, he is in a position to make a valid agreement for the sale thereof. As was said by Mr. Justice Paterson in *Burks v. Davies*, 85 Cal. 114, 20 Am. St. Rep. 213: "If, though he be not the absolute owner, it is in his power, by the ordinary course of law or equity, to make himself such owner, he will be permitted within a reasonable time to do so." If the agreement is made by him in good faith, and he has at the time such an interest in the land, or is so situated with reference thereto, that he can carry into effect the agreement on his part at the time when he has agreed so to do, it will be upheld: 1 Chitty on Contracts, 11th Am. ed., 431; *Dresel v. Jordan*, 104 Mass. 407; *Townshend v. Goodfellow*, 40 Minn. 312; 12 Am. St. Rep. 736;

Smith v. Cansler, 83 Ky. 371; *Gaither v. O'Dougherty*, Ky., Nov. 1889; *Tapp v. Nock*, 89 Ky. 414; *Ley v. Huber*, 3 Watts, 367; *Tiernan v. Roland*, 15 Pa. St. 429. We cannot lose sight of the proposition that in this country, where values of land fluctuate rapidly, and where transfers are so frequent, it is very common for the purchaser of land to make a transfer before he has acquired the title. It would work great injustice to hold that no one could make a valid contract for the sale of land until he has himself become clothed with the absolute title. Even in the present case it appears that the plaintiff, after the agreement for the purchase was made, placed the property on the market immediately after the first payment was made, and endeavored to sell the same prior to his obtaining the title thereto. He himself testifies: "I was trying all the time to make a trade of the property pending our getting a title to the property."

It has been held that when the vendor has no interest whatever in the lands which he agrees to convey, and his contract of sale is the mere speculation of a volunteer, courts will refuse to enforce the contract at his instance, and will rescind the agreement at the instance of the vendee, upon the ground that the contract was not made in good faith. The correctness of this rule in its application to a case wherein there is no charge of bad faith has, however, been seriously questioned, and was distinctly repudiated in *Dresel v. Jordan*, 104 Mass. 407. It is held, also, that the vendee may maintain an action to rescind the agreement upon the ground that the vendor, at the time of entering into the agreement, knew that he could not make the conveyance, or fraudulently represented himself as the owner of the premises: *Innes v. Willis*, 48 N. Y. Sup. Ct. 192; and that, if, subsequent to entering into the agreement, the vendor voluntarily puts it out of his power to complete the contract, — as, if he should sell the land to another pending the existence of the agreement, — the vendee may treat the contract as rescinded, and bring his action for the deposit: *Burwell v. Jackson*, 9 N. Y. 535. In either of these cases the ground for the rescission is the fraud of the vendor, either at the time of entering into the contract or by his subsequent acts.

There is no question, however, in the present case, of fraud or misrepresentation on the part of the defendants. Montgomery informed Lawrence, who in making the purchase was acting for the plaintiff, of the exact condition of the title, and

the relation which Chase bore to it. Whether Lawrence informed the plaintiff thereof is immaterial. The fact that Lawrence knew all about it before making the agreement removes all charge of fraud or concealment on the part of the defendants. The plaintiff, moreover, does not place his right of recovery upon the ground of fraud, but solely upon the fact that Chase did not have the title to the land at the date of the agreement. Chase, however, although not then holding the absolute title, did have an interest in the land sufficient to sustain an agreement on his part to sell the same. The plaintiff, in an action therefor, with proper parties, could at any time have enforced a specific performance in his behalf of the contract with Chase. Chase had furnished the money with which Montgomery and Rea had paid Albers the deposit on the contract of sale. The purchase had been made in pursuance of previous directions from Chase to Montgomery and Rea, and after the contract had been entered into, had been ratified by Chase. As between Chase on the one part and Montgomery and Rea on the other, the interest acquired by that contract belonged to Chase, and in a proper action Albers could have been compelled to convey to Chase, as he afterwards did voluntarily so convey. Prior to making the contract with the plaintiff, Chase had authorized Montgomery and Rea, who were his agents, to sell the land, and in pursuance of such order, which was in writing, and exhibited to Lawrence, they made the agreement with the plaintiff in the name of Chase. This was such an additional recognition by them of the interest of Chase in the land, that Chase would be able to enforce any *bona fide* contract made by them in his behalf.

It is not necessary for us to decide whether, by the terms of this agreement, the title was to pass to the plaintiff prior to the payment of the last installment. The general rule, in the absence of special provisions in reference thereto, is, that the vendee is not entitled to a conveyance until the full payment of the purchase-money, and that the acts of payment and conveyance being mutual and dependent, neither party is in default until after tender and demand by the other. In the present case we have seen that the right of rescission did not exist, and in any action upon the contract, either to enforce it or to recover damages for its breach, it was incumbent upon the plaintiff to show a performance on his part of all the acts required to be performed by him before he could

call upon Chase, and a subsequent failure on the part of Chase to comply with his part of the agreement. The plaintiff, not having alleged or proved such performance, is not in a position to maintain an action for the recovery of the money paid by him in part performance of his obligations, while the contract is still in existence and uncompleted.

The judgment and order of the court below are reversed, and the cause remanded for a new trial.

Hearing in Bank denied.

VENDOR AND PURCHASER. — RECEIPT GIVEN BY VENDOR OF LAND CONTRACT FOR SALE OF LAND WHEN: *Falls of Neuse etc. Co. v. Hendricks*, 106 N. C. 485.

VENDOR AND PURCHASER — STATUTE OF FRAUDS. — A MEMORANDUM SUFFICIENT TO SATISFY the statute of frauds must be such that when produced in evidence it will inform the court or jury of the essential facts set forth in the pleading: *Mentz v. Newwitter*, 122 N. Y. 491; 19 Am. St. Rep. 514, and note. It is sufficient if the land is described as that which the vendee is now in possession of: *Phillips v. Swank*, 120 Pa. St. 76; 6 Am. St. Rep. 691, and note. See note to *Worrall v. Munn*, 55 Am. Dec. 344. A memorandum of an agreement to sell real estate, describing the property, and signed by the vendor, is sufficient: *Dennis v. Strassburger*, 89 Cal. 584. A letter to one whom the writer has treated as a son, promising to give him a house upon his marriage, is insufficient: *Usher v. Flood*, 83 Ky. 552. Letters written by the owner of real estate in regard to an exchange, which do not state the terms of any agreement, is insufficient: *Swain v. Burnette*, 89 Cal. 564. See *Benson v. Shotwell*, 87 Cal. 49.

VENDOR AND PURCHASER — GOOD TITLE IMPLIED IN CONTRACT OF SALE. —An agreement to make a good title is implied in every executory contract for the sale of land: *Moore v. Williams*, 115 N. Y. 586; 12 Am. St. Rep. 844, and note; *Townshend v. Goodfellow*, 40 Minn. 312; 12 Am. St. Rep. 736; *Heavner v. Morgan*, 30 W. Va. 335; 8 Am. St. Rep. 55. *

VENDOR AND PURCHASER — NECESSITY FOR VENDOR TO BE ABSOLUTE OWNER AT TIME OF SALE. —A defect in the title to the land when the contract of sale was made is no ground of objection thereto if the vendor can give good title at the time of the sale: *Gregory v. Christian*, 42 Minn. 304; 18 Am. St. Rep. 507, and note; *Mitchell v. Allen*, 69 Tex. 70. A contract to sell land cannot be satisfied when the vender has a mere equity: *Ankeny v. Clark*, 1 Wash. 550.

VENDOR AND PURCHASER — RECOVERY OF PURCHASE-MONEY WHEN. —A parol agreement to refund the purchase-money may be enforced upon a failure of title: *Close v. Zell*, 141 Pa. St. 390; 23 Am. St. Rep. 296. Recovery of money paid on a contract for the sale of land may be had where the vendor has not complied with the terms of the agreement: *Cleary v. Folger*, 84 Cal. 316; 18 Am. St. Rep. 187, and note; *Westhafer v. Patterson*, 120 Ind. 459; 16 Am. St. Rep. 330, and note; *Wright v. Dickinson*, 67 Mich. 580; 11 Am. St. Rep. 602; *Lutz v. Compton*, 77 Wis. 584; *Northridge v. Moore*, 118 N. Y. 420; *Dennis v. Strassburger*, 89 Cal. 583; *Dashaway Ass'n v. Rogers*, 79 Cal. 211; *Fenton v. Alsip*, 79 Cal. 402; *Reynolds v. Borel*, 86 Cal. 538; *Benson v. Shotwell*, 87 Cal. 49; *Moser v. Cochrane*, 107 N. Y. 35; *Ferguson v.*

Teel, 82 Va. 690. The fact that the vendee was aware of the defect in his vendor's title does not affect his right to recover his deposit: *Boyer v. Amet*, 41 La. Ann. 721.

WHERE THERE IS A WRITTEN AGREEMENT between two parties for a conveyance of land, acknowledging a part payment of the purchase price, the vendee is entitled to a conveyance: *Steiner v. Zwickey*, 41 Minn. 448. Possession and improvements by a parol vendee of land entitle him to a specific performance: *Hunkins v. Hunkins*, 65 N. H. 95.

MURRAY v. HOME BENEFIT LIFE ASSOCIATION.

[90 CALIFORNIA, 402.]

INSURANCE—FORFEITURE FOR DEFAULT OF ASSURED WAIVED BY RECOGNIZING CONTINUED VALIDITY OF POLICY.—If an insurance company, after knowledge of any default for which it might terminate a contract of insurance, enters into negotiations or transactions with the assured, which recognize the continued validity of the policy, and treat it as still in force, the right to claim a forfeiture for such previous default is waived.

INSURANCE—WAIVER—UNCONDITIONAL OFFER TO ACCEPT OVERDUE PREMIUM IS WAIVER OF FORFEITURE WHEN.—An unconditional offer by an insurance company to accept, at a future time, an overdue premium, with a tender of payment in pursuance of such offer, is a waiver of any forfeiture that might have been enforced because the premium was not paid when due.

INSURANCE—WAIVER OF FORFEITURE TREATED AS UNCONDITIONAL WHEN.—A forfeiture is not favored, and will not be enforced unless specifically and definitely provided for in the contract; and a waiver thereof will be treated as unconditional, unless it clearly appears that it was otherwise understood by the parties.

INSURANCE—TENDER MAY BE MADE WITHIN REASONABLE TIME.—Where an insurance company requests the assured to make overdue payments of premium after a forfeiture has accrued, without any conditions being annexed to the request, a tender of such payment may be made within a reasonable time after such request. And the fact that at the time of the tender the assured was in his last illness, and within a few days of his death, will not render the tender ineffectual, where the offer to receive the assessments contains no conditions that the assured must be in good health at the time of payment.

INSURANCE—QUESTIONS RELATING TO POLICY IN ANOTHER COMPANY NOT RELEVANT WHEN.—In an action by the administratrix of the insured upon a life insurance policy, the defendant company cannot properly question the plaintiff as to another policy in another company held by the deceased, and as to the payment of premiums thereon.

ACTION upon a policy of life insurance. The opinion states the case.

L. T. Hengstler and James Alva Watt, for the appellant.

T. C. Van Ness, and Van Ness and Roche, for the respondent.

DE HAVEN, J. The plaintiff is the beneficiary named in an insurance policy upon the life of one Lemuel T. Murray, the policy being a certificate of membership issued by defendant to said Murray upon accepting him as a member of said Home Benefit Life Association. By the terms of the certificate, the holder was to pay to the defendant six assessments per annum, at stated times and in stated amounts, and it was also provided that no claim was to be made thereunder "should the member neglect or omit to pay the last assessment that may have been levied on this certificate within thirty days from the date of the notice thereof." Upon September 1, 1886, the assessments which had fallen due on June 1st and August 1st of that year were still unpaid, and the defendant on that day addressed a note to said Murray, calling his attention thereto, with a request that he remit the amount due. At or about the same day it also addressed to him this letter: —

"According to the conditions of your certificate of membership, No. 8361, an assessment amounting to \$29.40 will be due and payable at this office on the 1st of October, 1886. Remittances should always be made payable to

"HOME BENEFIT LIFE ASSOCIATION,

"San Francisco, Cal.

"Return this notice with remittance."

On September 22, 1886, the said Murray, unable from sickness to make the payment in person, sent to the defendant the amount due on assessments for June and August of that year, which the defendant declined to receive, its president saying that he could not, under the circumstances, "but would be only too happy to do so" when Murray should come and tender it himself. Murray died on September 30, 1886. The plaintiff was nonsuited, and the only question before us is, whether, upon the foregoing facts, the certificate or policy was in force at the date of Murray's death.

There can be no doubt that the failure of the deceased to pay the assessments of June and August within thirty days after notice thereof released the defendant from all further liability upon the certificate held by him, if the defendant company had so elected; but conditions like that before quoted from this certificate, which, in effect, provide for a forfeiture of all rights thereunder, unless payment of assessments is made within the time specified, may always be waived by the party for whose benefit they are inserted in

the contract; and the rule is firmly established in this class of cases that if the insurance company, after knowledge of any default for which it might terminate the contract, enters into negotiations or transactions with the assured, which recognize the continued validity of the policy, and treat it as still in force, the right to claim a forfeiture for such previous default is waived: *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83; *Queen Ins. Co. v. Young*, 86 Ala. 424; 11 Am. St. Rep. 51; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 419. Imposing or collecting an assessment by a mutual insurance company, after the company has knowledge of facts entitling it to consider the policy no longer binding upon it, without its assent, is, upon this principle, held to be a waiver of the right to claim the forfeiture which otherwise it might have insisted upon. The cases are numerous which hold that the acceptance of a premium after the time when it should have been paid is a waiver of the forfeiture which might have been enforced because it was not paid when due, and precisely the same effect is given to an agreement to accept at a future time such overdue premium, and a tender in pursuance of such agreement. In speaking of acts showing an election to continue the existence of the policy of insurance, and to waive a forfeiture incurred, the supreme court of the United States in the case of *Insurance Co. v. Norton*, 96 U. S. 234, say: "It is conceded that the acceptance of payment has this effect; and we do not see why an agreement to accept, and a tender of payment according to the agreement, should not have the same effect. Both are acts equally demonstrative of the election of the company to waive the forfeiture of the policy."

The respondent, while not disputing the general rule that a forfeiture may be waived at the option of the person entitled to enforce it, insists that the letters of the defendant, above referred to, show only an offer by it to waive the previous default in the payment of the June and August assessments upon condition that such past-due assessments were immediately paid, and while the insured continued in the same state of health. There are no such conditions expressed in these letters, and we do not think any such arise therefrom by legal implication. The one, calling attention to the assessments already due, and requesting payment, specified no time within which such payment was to be made. A tender, therefore, within a reasonable time would have been sufficient to satisfy the requirements of this letter, and it cannot be said as a

matter of law that the tender actually made was not within such time. But the letter notifying the insured that an assessment would be due and payable on October 1st, and, in substance, requesting payment, of itself constituted a waiver of the previous default, and must be construed as an unconditional offer to accept payment of that assessment on or before the date named. It was, in effect, an assertion that the certificate was still in force, and, notwithstanding previous defaults known to the defendant, would remain in force until the date therein named for such payment. As already stated, this notice was sent after full knowledge by defendant of the non-payment of the previous assessments; and if it was the intention to make the acceptance of the amount to become due on this assessment conditional upon the payment of such prior assessments, immediately upon the receipt of the other letter, it should have so stated; but not having done so, we think its legal effect was to waive the previous forfeiture, and continue the certificate in force until October 1st; and this being so, the insured had the right at any time after receiving it, and before October 1st, to make payment of all assessments accruing prior thereto, and necessary to be made in order to give the certificate continued existence.

Forfeitures are not favored, and it necessarily follows from the rule that a forfeiture will not be enforced unless specifically and definitely provided for in the contract, that a waiver thereof will be treated as unconditional, unless it clearly appears that it was otherwise understood by the parties. The supreme court of the United States, in *Insurance Co. v. Norton*, 96 U. S. 234, say: "It is true, we held in *New York L. Ins. Co. v. Statham*, 93 U. S. 24, that in life insurance, time of payment is material, and cannot be extended by the courts against the assent of the company. But where such assent is given, the courts should be liberal in construing the transaction in favor of avoiding the forfeiture." And there is nothing unjust in this rule, as the party entitled to claim a forfeiture need not waive it, but may stand upon his contract as written; or if he desires to waive his strict right only upon condition, the condition can be specified so as to leave no doubt of the real intention. In giving further time for the payment of the assessments of June and August by its letter of September 1st, the defendant could, if it had so desired, have prevented all controversy by fixing the time within which they must be paid, or by requiring immediate pay-

ment, as was done by the insurance company in *Servoss v. Western Mut. Aid. Soc.*, 67 Iowa, 86, a case cited and relied upon by respondent.

The fact that no tender of payment was made by the insured until his last illness was upon him, and near his death, we do not regard as material. If the certificate was then in force, and we hold that it was, he had a right to pay what was then due. It was not made a condition of defendant's offer to receive said assessments that he must be in good health at the time of payment.

As the case must be remanded for a new trial, it is proper to add that the questions asked on the cross-examination of the plaintiff, relating to the policy held by the deceased in another company, and the payment of premiums therein, are not relevant to any issue in this case.

Judgment and order reversed.

INSURANCE—WAIVER OF FORFEITURE—WHAT CONSTITUTES.—Where after breach of condition in an insurance policy, the insurer, with knowledge of the facts, by his conduct, leads the insured to believe that he still recognizes the validity of the contract, he will be deemed to have waived the forfeiture: *Grubbs v. North Carolina etc. Ins. Co.*, 108 N. C. 472; 23 Am. St. Rep. 62, and note; *Queen Ins. Co. v. Young*, 86 Ala. 424; 11 Am. St. Rep. 51, and note; *Conigland v. North Carolina etc. Ins. Co.*, Phill. Eq. 341; 98 Am. Dec. 89; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83, and note.

INSURANCE—WAIVER OF FORFEITURE FOR NON-PAYMENT OF PREMIUMS.—A right to declare a forfeiture of an insurance policy for non-payment of premiums may be waived, and the waiver may be manifested as well by conduct as words: *Phoenix Ins. Co. v. Tomlinson*, 125 Ind. 84; 21 Am. St. Rep. 203, and note; *Germania etc. Ins. Co. v. Hick*, 125 Ill. 351; 8 Am. St. Rep. 384, and note. Where a request is made by an insurer for an overdue premium, and the same is paid, the insurer is estopped to set up a forfeiture for non-payment of the same before it was due: *True v. Bankers' etc. Ass'n*, 78 Wis. 287.

INSURANCE—FORFEITURES.—Forfeitures are not favored by the law, and the courts will put such a construction on the conduct of the parties as will produce a waiver thereof, if possible: *Phoenix Ins. Co. v. Tomlinson*, 125 Ind. 84; 21 Am. St. Rep. 203, and note.

[IN BANK.]

INGERMAN v. MOORE.

[90 CALIFORNIA, 410.]

MASTER AND SERVANT — MASTER BOUND TO INSTRUCT INEXPERIENCED SERVANT IN REFERENCE TO DANGEROUS MACHINERY. — A master who puts to work upon a dangerous machine a servant known to be without experience in the particular work, and without knowledge of the actual dangers attending it, is bound to give him such instructions as will enable him to fully understand and appreciate the danger attending the work and the necessity for care.

SERVANT OF MATURE YEARS, WHEN ENTITLED TO INSTRUCTIONS CONCERNING DANGEROUS MACHINERY. — While the rule which requires an employer to give proper instructions to his servant in reference to dangerous machinery is most frequently applied in cases where persons of immature years are employed about dangerous machinery, the same principle governs where the person so put to work is of mature years, but without experience in the particular work, and without knowledge of the actual dangers attending it. But the fact that the person injured is of mature years is a matter for the careful consideration of the jury in determining whether he fully understood and appreciated the dangers of his position.

JURY TRIAL — WHETHER SERVANT EXPERIENCED IN WORK QUESTION FOR JURY WHEN. — Where it appears that an employee in a saw-mill was injured while running a scantling-machine and saw, in attempting to remove slivers from under the saw, by reason of his sleeve catching on a concealed set-screw fixed upon and projecting from a shaft located below the saw, the fact that he had been employed in the mill for nearly two years, and had been working as an assistant on the scantling-machine, in putting the lumber in place to be sawed, for about nine months, and had, in the absence of the foreman, upon different occasions, run the machine for eighteen days in all, does not warrant the court in declaring as matter of law that he was experienced in the work he was doing, and had knowledge of the set-screw and of the danger of placing his hand where he did while the machine was running, but his experience and knowledge of the machine are questions of fact for the jury.

CONTRIBUTORY NEGLIGENCE QUESTION OF FACT WHEN. — Where an employee is injured by attempting to remove slivers from under a saw without stopping the machinery, the fact that he did not stop the machinery before attempting to remove the slivers does not, of itself, constitute contributory negligence, but it is a question for the jury to determine whether he was exercising due care in what he did. And the jury may take into consideration the facts, that he had often seen such obstructions removed from near the same place when the saw was in motion, and had not been notified that it was dangerous to do so; that to have stopped the machinery to remove the slivers would have occasioned delay in the work; and that it was not the custom to do so.

INSTRUCTION WHICH IS NOT PREJUDICIAL NOT GROUND FOR REVERSAL. — An instruction to the jury which could not have injured the party complaining thereof, under the evidence in the case, is not ground for reversal.

EMPLOYER LIABLE FOR NEGLIGENCE OF HIS SUPERINTENDENT. — The fact that the owner of a saw-mill did not manage the mill in person, and did

not personally employ or have communication with a servant injured while at work upon dangerous machinery, does not absolve him from liability for the negligence of his superintendent or foreman in putting the servant to work without proper instructions.

ORDERS GRANTING NEW TRIAL AND REVOKING SAME NO PART OF RECORD ON APPEAL WHEN. — On an appeal from an order denying a new trial, a previous order of the trial court granting a new trial, and its subsequent order vacating and setting aside that order and reinstating the motion for a new trial, which are not embodied in any bill of exceptions, but which are filed as an "additional record," upon the suggestion of a diminution of the record, do not properly form part of the record on appeal from the order denying the new trial, and will not be considered.

ACTION for personal injuries. The opinion states the case.

Jarboe, Harrison, and Goodfellow, and William F. Herrin, for the appellants.

Pillsbury and Blanding, for the respondent.

DE HAVEN, J. This is an action to recover damages for a personal injury sustained by the plaintiff, and alleged to have been caused by the negligence of the defendants.

The complaint alleges, in substance, that at the date of receiving the injury, and for some time prior thereto, plaintiff was employed by defendants in their saw-mill; that his regular work was to assist the man in charge of a "scantling-machine and saw" for cutting lumber, plaintiff's duty being "to put the lumber in place to be run through the machine and cut by the saw." On or about February 14, 1884, the man regularly employed to run this machine became sick, and plaintiff was directed by the defendants to take his place for the time. The plaintiff expressed a doubt as to his ability to do so, on account of his inexperience, but was assured by defendants that he was qualified to take charge of this work, and he did so. While engaged in this work, in removing some slivers from under the saw, plaintiff's sleeve caught on a set-screw fixed upon and projecting from a shaft located below the saw, which shaft worked the rollers carrying lumber to the saw, and by means thereof the arm of plaintiff was wound around the shaft, and so broken as to necessitate amputation. It is alleged that the plaintiff did not know of this set-screw, and could not see the same, and was not acquainted with the danger of removing the slivers, and that in the attempt to remove the same he acted in the same manner as he had seen the man do who had regular charge of the machine. The complaint further alleges that the work of running the machine was dangerous, and plaintiff was inexperienced and

ignorant of the dangers attending the same, and that defendants knew this, and neglected to warn him of such dangers, or properly instruct him in such work.

In their answer, the defendants allege that plaintiff was employed to take the place of the foreman on the scantling-machine, when for any reason necessary; that he had frequently done so, and was fully acquainted with the work, and never expressed any doubt of his ability to run the machine and saw; that he had been fully instructed and warned concerning the saw and the mode of using it, and of the danger of said employment; and that plaintiff knew the work was dangerous, and that it was fraught with danger to attempt to remove slivers from the saw when in motion.

Plaintiff recovered a judgment for twelve thousand five hundred dollars and costs. The defendants appeal.

The principles of law governing this class of actions are clearly defined. It is well settled that one who enters the service of another takes upon himself the ordinary risks of the employment; and if he is an adult, and engages to do a particular work, the employer has a right to presume, unless otherwise informed, that the employee is competent to perform it, and understands and appreciates such risks. But, on the other hand, when one who is known to be an inexperienced person is put to work upon machinery which is dangerous to operate unless with care, and by one familiar with its structure, the employer is bound to give him such instructions as will cause him to fully understand and appreciate the danger attending the employment and the necessity for care. This rule is thus stated by the supreme court of Wisconsin: "We think that it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous, and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them and do his work safely with proper care on his part": *Jones v. Florence Min. Co.*, 66 Wis. 277; 57 Am. Rep. 269.

It is true, this rule, which requires the employer to give

proper instructions, is most frequently applied in cases where persons of immature years are employed about dangerous machinery, but the same principle governs where the person so put to work is of mature years, but without experience in the particular work, and without knowledge of the actual dangers attending it. But, of course, the fact that the person injured was of mature years, as was the plaintiff here, is a matter for the careful consideration of the jury in determining whether he fully understood and appreciated the dangers of his position.

It is claimed by the appellants that they were not guilty of any negligence toward plaintiff, and that plaintiff, by his own want of care, contributed to the injury which he received.

In passing upon the question of defendants' alleged negligence, it was necessary for the jury to determine, — 1. Was plaintiff in fact inexperienced in the work in which he was engaged? and if so, 2. Were defendants informed of this fact? 3. If defendants were so informed, did they neglect to give him notice of the location of the set-screw, and to instruct him in the manner of running the machine, so as to guard him against the injury which he received?

The verdict of the jury necessarily implies that all of these questions were answered affirmatively in the minds of the jury, and upon all of them there is a substantial conflict in the evidence, unless it can be said as a matter of law that upon the plaintiff's own statement showing the length of time he had been employed as assistant on the machine, and how much he had himself run it in the absence of the foreman, the jury ought to have found that he was not inexperienced in the place he was temporarily filling, and not without knowledge of the location of the set-screw and the danger to be incurred from placing his hand where he did while the machine was running. It appears from plaintiff's own testimony that he had worked inside of the mill, taking lumber from the big saw for nearly two years, and had been employed as assistant on the scantling-machine — that is, in putting the lumber in place to be cut by the saw — for about nine months, and during that time he had, upon different occasions when the foreman was absent, run the machine, in all, eighteen days prior to the accident.

It does not appear that plaintiff's duty as assistant was such as would necessarily give him knowledge of the structure of the machine, or of the existence of the projecting set-

screw, which was a concealed danger. It is not shown that he had ever been called upon or that it was any part of his duty to become acquainted with this machinery, or to adjust it when out of order. It is doubtless true that some men with the same opportunity would have become familiar with its mechanism, and fully qualified to take charge of it, but it is a matter of common experience that all men would not. There is a difference in the capacity of men to acquire a particular knowledge of machinery, or of the arrangement of its parts or manner of construction, some having greater power of observation, and more desire to investigate and understand, than others. The extent of plaintiff's knowledge of this machinery was therefore a question of fact for the jury to determine from all the evidence before them, and we think it was fairly submitted to them in the instructions of the court.

The defendants insist that the plaintiff was himself guilty of contributory negligence in attempting to remove the sliver without stopping the machinery. We think, however, that, upon the evidence in this case, this was a question of fact to be determined by the jury, and the finding upon this point would depend largely upon plaintiff's knowledge, or want of knowledge, of the location of the set-screw. If he knew the screw was there and projecting, it was gross carelessness for him to place his hand where he did, with this shaft in motion. If he was ignorant of its existence, it was still a question for the jury to consider whether he was exercising due care in what he did, unless he knew that he could remove the sliver with safety to himself. In reaching a conclusion, the jury might properly consider that he had often seen such obstructions removed from near the same place when the saw was in motion, and had received no notice that it was dangerous to do so, and that to have stopped the machinery in order to remove the sliver would have occasioned delay in the work, and that it was not the custom to do so. It seems clear to us that the inference to be drawn from these facts would not necessarily be that the plaintiff was guilty of culpable negligence, and different persons might fairly differ as to the proper conclusion to be reached. In such a case, the question to be decided is one of fact for the jury, and not of law for the court. And when the matter has been passed upon by the jury, and the judge of the trial court is satisfied with their finding, the verdict is conclusive of the question here.

The law upon this point is clearly stated in the case of

Coombs v. New Bedford Cordage Co., 102 Mass. 585, 3 Am. Rep. 506, as follows: "Whether it was possible for the plaintiff to have met with the accident from inadvertence or want of acquaintance with the danger of his position, without being chargeable with a want of reasonable care, we think is a question to be submitted to the jury. The facts that he saw, or might have seen, the machinery in motion, and might have known that it was dangerous to expose himself to be caught in it, are considerations which should be regarded on one side. On the other, some allowance should be made for his youth, his inexperience in the business, and for the reliance which he might have placed upon the direction of his employers. It has been held in other cases that previous knowledge of a danger is not conclusive evidence of negligence in failing to avoid it."

In the case of *Swoboda v. Ward*, 40 Mich. 420, the plaintiff had been working in the mill for about fourteen days, carrying slabs from the gang-saws and placing them on the rollers, and when injured he had taken hold of a heavy slab, too heavy for one man to carry, and was pulling it, walking backwards, when he slipped back against the cog-wheels near the slab-run, and his feet were caught, and leg drawn into the cog-wheels and permanently injured. It was shown that he had not been warned about the cog-wheels, and had never noticed them until he was hurt, but that he could have seen the cogs if he had stopped work to look for them, and that he was without experience and knowledge in mills. Upon these facts, the court held that the question of contributory negligence was for the jury, and that the trial court erred in holding as a matter of law that there was such negligence.

The court there said: "The plaintiff, at the time of the injury, was properly engaged in the active discharge of his duty. He testified that he had not been warned about these cogs, and had not noticed them until after he was hurt. Contributory negligence presupposes the doing of some act which ought not to be done, or the omission to do something which should be done; in other words, a want of due care: 5 Am. Law Reg., N. S., 405, note. If he did not know of the exposed and dangerous condition of these cogs, then by remaining at work he was not doing something which he should not have done, and the effort he was making, at the time of the accident, to remove the slab showed no want of due care on his part, but, on the contrary, was commendable. Even if

he had known of the cogs and their unguarded condition, it would not thereby conclusively follow that he could not recover. Other facts and circumstances would have to be considered in connection therewith, — his age, his intelligence, his experience, and such like, — so that the jury might ascertain and determine whether he fully understood and appreciated the danger.”

To the same effect is *Dowling v. Allen*, 74 Mo. 13; 41 Am. Rep. 298. This case again came before the supreme court of Missouri, reported in 102 Mo. 213, and the same principle was reaffirmed.

The jury must have found in this case that plaintiff was without knowledge of the existence of the set-screw, and did not know that he was exposing himself to danger from it when he placed his hand where he did. We do not feel authorized to disturb the verdict of the jury on this point.

The instruction complained of, to the effect that if defendants were negligent in not giving proper instructions to plaintiff, it was immaterial whether his hand was pulled off by the screw or cut off by the saw, could not, upon the evidence before the jury, have injured the defendants.

We have not overlooked the fact that in this case the defendants did not manage their mill in person, and did not personally employ plaintiff, or have any communication with him personally. If their superintendent, or other foreman, was negligent in putting the plaintiff to work without proper instructions, such negligence is in law that of the defendants, and they are liable for it.

The defendants have appealed from the order of the superior court made April 3, 1888, denying their motion for a new trial, and upon the argument of this case suggested a diminution of the record, and asked leave to file, as an “additional record,” the previous order of that court made in this action January 30, 1888, granting a new trial thereof, and the subsequent order vacating and setting this aside and reinstating the motion for a new trial. It is claimed by the appellants that the power of the court was exhausted when it granted the motion for a new trial, and that its subsequent orders vacating this and denying their motion for a new trial were absolutely void. This additional record is not embodied in any bill of exceptions, and we do not think it forms any part of the record on this appeal.

Judgment and order affirmed.

MASTER AND SERVANT — DUTY OF MASTER TO INSTRUCT SERVANT AS TO DANGEROUS MACHINERY. — It is the duty of a master to give a servant such instruction as to dangerous machinery as he appears to need: *Ciriack v. Merchants' etc. Co.*, 151 Mass. 152; 21 Am. St. Rep. 438, and note; *Nadau v. White River etc. Co.*, 76 Wis. 120; 20 Am. St. Rep. 29, and note. It is the duty of the master to inform his servant as to the danger of his work: *Missouri etc. R'y Co. v. White*, 76 Tex. 102; 18 Am. St. Rep. 33, and note; *McAvoy v. Pennsylvania etc. Co.*, 140 Pa. St. 1; *Allen v. Augusta Factory*, 82 Ga. 76.

MASTER AND SERVANT — LIABILITY OF MASTER FOR NEGLIGENCE OF VICE-PRINCIPAL OR SUPERINTENDENT. — Where a master puts the care and oversight of a branch of his business in the hands of an agent, he will be liable for any breach of duty of such servant or agent: *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180, and note. The negligence of the superintendent is the negligence of the master: *Galveston etc. R'y Co. v. Smith*, 76 Tex. 611; 18 Am. St. Rep. 78, and note; *Reilly v. Hannibal etc. R. R. Co.*, 94 Mo. 600.

MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE OF SERVANT, WHEN A QUESTION OF FACT. — Where danger is pointed out to a servant, which is, however, in such a position that he cannot see it, and he is injured thereby, and testifies that he did not know of its existence until the accident, his contributory negligence is a question for the jury: *Nadau v. White River etc. Co.*, 76 Wis. 120; 20 Am. St. Rep. 29, and note. Negligence of master and contributory negligence of servant are questions for the jury: *McDonald v. Chicago etc. R'y Co.*, 41 Minn. 439; 16 Am. St. Rep. 711, and note; *Goodrich v. New York etc. R. R. Co.*, 116 N. Y. 398; 15 Am. St. Rep. 410. In an action by a servant against his master, the negligence of the plaintiff is a question for the jury: *Smith v. Dunham*, 74 Mich. 310; *Porter v. Western etc. R. R. Co.*, 97 N. C. 66.

WELCOME v. HESS.

[90 CALIFORNIA, 507.]

STATUTE OF FRAUDS — SURRENDER, WHAT CONSTITUTES, AND HOW MADE. —

A surrender is the yielding up of an estate for life or years to the reversioner or remainderman. Under the statute of frauds, it can be made only by express consent of the parties in writing, or by operation of law when the acts of the parties imply that both have consented, and are such as estop them from disputing the fact of surrender, and as would not be valid unless the term were ended.

FORMAL SURRENDER OF LEASE UNNECESSARY WHEN. — Where a landlord resumes possession with the acquiescence of the tenant, or gives a lease to another, or does any act which amounts to an eviction, he will be estopped from disputing the surrender, and a formal surrender will be unnecessary.

ACTS IMPLYING CONSENT TO SURRENDER OF LEASE INDEPENDENT OF INTENTION OF PARTIES. — A surrender of a lease by operation of law results from acts which imply mutual consent, independently of the intention of the parties that their acts shall have that effect. It is by way of estoppel.

TENANT CANNOT ABANDON WITHOUT ACCEPTANCE OF SURRENDER BY LANDLORD. — A tenant cannot abandon his title; and notwithstanding he has gone out, unless the surrender is accepted by the landlord, his right of possession continues during the term.

LANDLORD ESTOPPED FROM DENYING SURRENDER OF LEASE WHEN. — A landlord who takes possession of premises abandoned by his tenant before the expiration of the term, and relets them for a period longer than the remainder of the term without notifying the original lessee that he would do so on his account, and without notifying him that he would continue to hold him liable for the rent, will be estopped from denying that he accepted the surrender of the lease.

LANDLORD ESTOPPED FROM CLAIMING DAMAGES FOR EXPENSE OF IMPROVEMENTS WHEN. — Where a lease provides that compensation to the landlord for an improvement made by him for the tenant's benefit is to be made solely from the rents reserved, the landlord, by accepting a surrender of the leased premises, is estopped from claiming damages for the expense of the improvement.

ACTION to recover damages. The opinion states the case.

Judson, Hester, and Russell, and M. C. Hester, for the appellant.

Enoch Knight, and Brousseau and Hatch, for the respondents.

TEMPLE, C. Plaintiff appeals from an order refusing a new trial.

This action is by a landlord to recover damages from his tenants. He avers that in October, 1887, he owned the demised premises, and was carrying on there a lucrative bakery business, which business added largely to the value of the premises; that defendants proposed to hire the premises, bakery, and business for five years, and to purchase his horses and wagons, and the equipments of the establishment, and falsely and fraudulently represented that they would enlarge the establishment and business, and would operate the same for five years, when they would surrender the establishment and business to the plaintiff, while in fact they had no such intention, but their real design was to get control of the establishment and business, and to remove the same to some other locality in the city; that, believing the representations, plaintiff did execute a lease to them, wherein defendants agreed to pay plaintiff, for the term of five years from October 19, 1887, the sum of \$4,380, in monthly installments, sixty-five dollars per month for the first and second years, seventy-five dollars per month for the third and fourth years, and eighty-five dollars per month for the fifth year, and to surrender the premises at the end of that term in good condition;

that they took possession, occupied, and paid rent until June 30, 1888, when they abandoned the premises, removed therefrom the bakery business, and since that time have been carrying on the business at another point in the city of Pasadena; that by reason of the abandonment plaintiff was compelled to, and did on the 1st of September, 1888, take possession of the premises and relet them for the term of five years at forty dollars per month, which was the best rental he could obtain. He charges that by reason of the abandonment of the premises and the diversion of the business he has been damaged in the sum of three thousand dollars.

Plaintiff also claims to recover for the cost of adding a storeroom for the defendants, which he avers added nothing to the value of the premises, and also for their failure to surrender the premises in good condition.

The answer admits the lease, and that defendants moved out of the premises June 30, 1888. It avers that plaintiff had not kept his part of the agreement; that he did not give them the use of a certain out-building which he had agreed to furnish, and that he neglected and refused to place the premises in an inhabitable condition; that, in consequence, the defendants were compelled to, and did, on the thirtieth day of June, 1888, surrender the demised premises to plaintiff, who accepted the same and took possession of the whole thereof.

The other allegations of the complaint are denied. A jury having been waived, the case was tried by the court.

It appears that defendants removed from the premises June 30, 1888, and sent the keys to plaintiff, claiming that plaintiff had not complied with his contract. Plaintiff did not at once re-enter, but on August 3d commenced an action to recover rent for the months of July and August.

September 1st, while that suit was pending, he called upon the defendants, and requested them to return and occupy the premises, which they refused to do. He then took possession, had the front painted, in order to obliterate the defendants' sign, made necessary repairs, and tried to find a new tenant, and finally rented them to Guan Kee for a laundry, for five years from October 1st, at forty dollars per month, which he says was the very best he could do. The new lease extended nearly one year beyond the term of defendant's lease.

So far as appears, nothing was said or done by plaintiff, other than is above stated, to qualify his acts in taking possession and reletting. He did not inform defendants that he

did not accept the offered surrender, or that he would relet on their account. This suit was commenced December 3, 1888.

Do these facts show a surrender of the term? A surrender is the yielding up of an estate for life or years to the reversioner or remainderman. Under the statute of frauds, it can be done only by express consent of the parties in writing, or by operation of law when the parties do something which implies that both have consented.

These acts are such as would estop the parties from disputing the fact of surrender, and which would not be valid unless the term were ended; as, for instance, a new lease accepted by the tenant, or the resumption of possession by the landlord if the tenant acquiesces, or the giving of a lease to another; and any act which will amount to eviction will estop the landlord, and make a formal surrender unnecessary. And while it is said that a surrender by operation of law is by acts which imply mutual consent, it is quite evident that such result is independent of the intention of the parties that their acts shall have that effect. It is by way of estoppel.

It was held in *Auer v. State*, 99 Pa. St. 370, 44 Am. Rep. 114,—and many cases are to the same effect,—that “the landlord may accept the keys, take possession, put a bill on the house for rent, and at the same time apprise the tenant that he still holds him liable for the rent. All this, as was said in *Marseilles v. Kerr*, 6 Whart. 500, is for the benefit of the tenant, and is not intended, nor can it have the effect, to put an end to the contract and discharge him from rent.”

In that case the trial court had instructed the jury, in effect, that if the tenant gives up the demised premises, the landlord may re-enter and relet, and that it is for the advantage of the tenant that he should do so, and being for the mutual advantage of the parties, it raises no presumption that the landlord has accepted a surrender. Of this instruction the court said: “We see no error in this. It is good sense as well as good law.”

In that case the landlord expressly refused to accept a surrender, and notified the defendant that he would hold him for the rent.

While there are many cases which hold to this view, the weight of authority and the better reason is the other way: *Ladd v. Smith*, 6 Or. 316. The term is an estate in lands. The tenant, subject to the covenants of his lease, is the owner

for the term. If he leaves the demised premises vacant, and avows his intention not to be bound by his lease, his title still continues, unless the landlord has accepted the offer of surrender. The landlord has no more right to the possession or to lease than a stranger. Admit that he may take such care of the property as will prevent waste, still he must not interfere with the right of the tenant to the absolute dominion and control. If he does so interfere, it is an eviction, and the tenant will be released.

The tenant cannot abandon his title; and notwithstanding he has gone out, unless the surrender is accepted, that continues. It is his right to resume possession at any time during his term. If he bring ejectment against the new tenant, what defense can the new tenant have, — except that plaintiff's right has ceased? How has it ended, unless by surrender?

The assertion that the reletting is for the interest of the tenant is gratuitous and unwarrantable, though if it were true, how would that fact tend to show authority in the landlord to dispose of the tenant's property? Any person might assume authority on the same ground.

The premises might be a rival business-stand which the tenant desires to have kept vacant. The complaint in this case substantially avers such fact. Perhaps if the tenant finally ascertains that his landlord will not accept the offered surrender, and could continue to collect his rents, he would elect to return.

It is said that defendants abandoned the premises at a time of great business depression at Pasadena. It may be that on the revival of business at the end of a few months they would have been glad to resume business there, and would have done so with profit if the landlord had not relet. Under such circumstances, shall they continue to pay rent? If the surrender has not been accepted, have they not been evicted?

But this case hardly comes up to the authorities which we have criticised. In taking possession, the landlord did not announce his intention to continue to hold the tenants. He relet without notifying the defendants that he should do so on their account. He relet for a period longer than the remainder of their term; thus showing plainly that he was acting in his own right, and not as their self-constituted agent. Under such circumstances, he cannot say that he did not accept the surrender.

The plaintiff also claims damages for the expense in building the storeroom for defendants, which he avers adds nothing to the value of the premises. His own statement being taken as true, it must be admitted that he has been hardly used, and if possible, consistent with legal principles, the courts should afford him relief. It is true that a lease is not only a grant or conveyance of an interest in land, but is also a contract between the parties, and upon a breach of any promise contained in it, the injured party has his action as upon other contracts; but the trouble is, that by the terms of the contract compensation to the landlord for this improvement was to be made by the rents reserved in the lease. When, therefore, he elected to release the tenants from the remainder of the term he gave up his stipulated mode of compensation. In other words, his acts which estop him from claiming rent have deprived him of his remedy.

The case of *Respini v. Porta*, 89 Cal. 464, 23 Am. St. Rep. 488, does not really militate against these views. It was the case of the lease—if it may be called such—of a dairy of cows, the necessary buildings, fixtures, and utensils, and pasturage for the cows. The right to the land was subordinate to the business, the stock in which belonged to the lessor. It partook more of the nature of an ordinary contract than a grant of a term. The landlord in such a case, when the tenant abandons, cannot refuse to take possession, for otherwise his property would perish.

An examination of the record in the case shows that the point was conceded. The only question was as to the rule of damages.

As to the other claims for damage, the findings are against the plaintiff, on the facts, and the evidence sustains the findings.

It follows that the order appealed from should be affirmed.

FOOTE, C., and BELCHER, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

LEASE—SURRENDER, WHAT CONSTITUTES, AND HOW MADE.—See *Respini v. Porta*, 89 Cal. 464; 23 Am. St. Rep. 488; *Chamberlain v. Dunlop*, 126 N. Y. 45; 22 Am. St. Rep. 807; *Smith v. Kerr*, 108 N. Y. 31; 2 Am. St. Rep. 362; *Bedford v. Terhune*, 30 N. Y. 453; 86 Am. Dec. 394, and note. A surrender is the yielding up of an estate for life or years to him who has the immediate estate in reversion: *Bailey v. Wells*, 8 Wis. 141; 76 Am. Dec. 233. Where the tenant offers to surrender his lease before its expiration, and the

landlord thereupon enters and takes exclusive possession of the premises, there is effected such a surrender and acceptance as will terminate the lease: *Kneeland v. Schmidt*, 78 Wis. 345. A mutual agreement between the landlord and the original tenant that the lease is terminated is necessary to establish the surrender of a lease: *Stewart v. Sprague*, 71 Mich. 50; *Stewart v. Sprague*, 76 Mich. 184. Each of several tenants, under a lease containing a stipulation to surrender property before the expiration of the lease, is the agent of the others to make such surrender: *Bergland v. Frawley*, 72 Wis. 559.

BURKETT v. GRIFFITH.

[90 CALIFORNIA, 532.]

SLANDER OF TITLE, ACTION FOR, MAINTAINABLE AGAINST WHOM. — An action for slander of title lies against one who falsely and maliciously disparages the title of another to property, whether real or personal, and thereby causes him some special pecuniary loss or damage as the direct and natural result of the words spoken.

ACTION FOR SLANDER OF TITLE, WHAT NECESSARY TO MAINTAIN. — To maintain an action for slander of title, it is necessary to establish that the words spoken were false, and were maliciously spoken by the defendant, and also that the plaintiff has sustained some special and pecuniary damage as the direct and natural result of their having been so spoken. And as words spoken of property are not in themselves actionable, the complaint in such action should distinctly and particularly set out the facts which show wherein the plaintiff has sustained special damage.

BOTH INJURY AND DAMAGE ESSENTIAL FOR MAINTENANCE OF ACTION FOR SLANDER OF TITLE. — To sustain an action for slander of title, there must be both injury and damage. The slanderous words, false in fact and maliciously uttered, constitute the injury and give the right of action, and the pecuniary damage sustained is the measure of recovery.

WORDS UTTERED AFTER CONTRACT OF SALE OF LAND NOT GROUND FOR ACTION FOR SLANDER OF TITLE. — Where words slandering a title are uttered after a sale of land has been completed, or agreed upon and contracted for, so as to give the plaintiff a contract capable of being enforced, he does not suffer any actionable damage from their utterance, although the purchaser was thereby deterred from performing his contract or induced to violate it. In order to show that the words uttered have caused injury to the plaintiff, it is generally necessary to aver and show that they were uttered pending some treaty or public auction for the sale of the property, and that thereby some intending purchaser was prevented from bidding or competing.

PLEADING IN ACTION FOR SLANDER OF TITLE CONSTRUED AGAINST PLEADER WHEN. — Where a complaint in an action to recover damages for slander of title avers an offer from a third person to purchase, and an acceptance of the offer by the plaintiff, and that by reason of the words spoken by the defendant such third person was intimidated, dissuaded, and deterred from carrying out his agreement with the plaintiff, it will be construed against the pleader, as intended to aver a complete and executed contract of purchase and sale between the plaintiff and such third person.

ACTION AGAINST PARTY FOR INDUCING ANOTHER TO VIOLATE HIS LAWFUL CONTRACT NOT MAINTAINABLE WHEN. — If a plaintiff has sustained any damage in consequence of the refusal of persons to perform their lawful contracts with him, it is damage which may be compensated in actions brought by him against those persons, and the law supposes that in such actions the plaintiff will receive a full indemnity, and he has no right of action against a defendant whose words, however false and malicious, have induced the other contracting party to violate such agreement.

PARTY RELEASING ANOTHER FROM OBLIGATIONS OF HIS CONTRACT MUST BEAR DAMAGE SUFFERED THROUGH HIS OWN ACT. — If a vendor of land releases a purchaser from the obligations of his contract, or does not desire to enforce the same, the damage which he may thereby sustain through his own voluntary act cannot be visited upon another, who is alleged to have induced such purchaser to violate his contract, but must be borne by himself.

COMPLAINT IN ACTION FOR SLANDER OF TITLE MUST DESCRIBE PROPERTY DISPARAGED. — In an action for slander of title to land, it is necessary for the plaintiff in his complaint to set forth and describe the property respecting which the defamatory statements have been made, and also to aver his title thereto, so that it may be shown wherein the defendant has done him any injury.

ARGUMENTATIVE PLEADING NOT PERMISSIBLE WHEN. — A complaint in an action for slander of title which alleges that the defamatory statements made by the defendant were, that the plaintiff had broken the covenants of leases, attached to the complaint as exhibits, and made part thereof only for the purpose of identifying the lands referred to, containing an option to purchase, and that plaintiff had forfeited all rights thereunder, and which alleges that he had a leasehold interest, with option and privilege of purchasing, but which does not directly allege the nature or extent of his leasehold interest, or the terms of his option, or what were the covenants of his leases, or the nature of his rights thereunder, and which shows those matters of substance argumentatively only by inference from the contents of the exhibits, fails to show that the statements and declarations of the defendant could have caused any damage or injury to the plaintiff.

MATTERS OF SUBSTANCE IN PLEADING MUST BE ALLEGED IN DIRECT TERMS. — Matters of substance constituting an essential element to a cause of action must be alleged in direct terms, and not by way of recital or reference, much less by exhibits merely attached to the pleading.

REFUSAL TO SELL TO LESSEE HAVING OPTION TO PURCHASE NOT SLANDER OF TITLE. — An allegation in a complaint in an action for slander of title, that the defendant had stated that he would not sell the lands described in leases from him to the plaintiff, containing an option to purchase, cannot be regarded as charging a slander of title, especially where it is not alleged that an intending purchaser was informed of such declaration.

ORIGINATOR OF SLANDER OF TITLE LIABLE ONLY FOR DAMAGE RESULTING DIRECTLY AND NATURALLY FROM HIS ACT. — The originator of a slander of title is only liable for such damage as is the direct and natural result of his act, and is not liable for the subsequent repetition by another, without his direction or authority, of words nor in themselves actionable.

ACTION to recover damages for slander of title. The opinion states the case.

John Roberts and J. D. Bicknell, for the appellant.

Stephen M. White and George W. Knox, for the respondent.

HARRISON, J. The plaintiff brought this action against the defendant to recover the sum of twenty-five thousand dollars damages, caused by certain false and malicious statements alleged to have been made by him concerning certain property of the plaintiff. The defendant demurred to the complaint upon the grounds of insufficiency and uncertainty; and from a judgment entered upon an order sustaining the demurrer the plaintiff has appealed.

Although the term "slander" is more appropriate to the defamation of the character of an individual, yet the term "slander of title" has by use become a recognized phrase of the law, and an action therefor is permitted against one who falsely and maliciously disparages the title of another to property, whether real or personal, and thereby causes him some special pecuniary loss or damage. In order to maintain the action, it is necessary to establish that the words spoken were false, and were maliciously spoken by the defendant, and also that the plaintiff has sustained some special pecuniary damage as the direct and natural result of their having been so spoken. As words spoken of property are not in themselves actionable, it is necessary to allege the facts which show wherein the plaintiff has sustained damage; and as special damage is the only ground upon which the action can be maintained, it is essential that such damage be distinctly and particularly set out in the complaint: *Linden v. Graham*, 1 Duer, 670; *Swan v. Tappan*, 5 Cush. 104; *Malachi v. Soper*, 3 Bing. N. C. 371. It is not actionable to speak disparagingly of the title of another, unless he is damaged thereby. The utterance of a mere falsehood, however malicious, will not sustain an action, unless damage has resulted therefrom: Addison on Torts, 25; and the damage which can be recovered is only such as is the direct and natural result of the utterance of the words. As in all other cases dependent upon special damage, there must be both injury and damage. The slanderous words, false in fact and maliciously uttered, constitute the injury and give the right of action; and the pecuniary damage sustained is the measure of recovery. If the

words uttered are not false, or if there be no malice, there is no right of action, and there can be no recovery, unless some special pecuniary damage has resulted from their utterance. In order to show that the words uttered have caused injury to the plaintiff, it is generally necessary to aver and show that they were uttered pending some treaty or public auction for the sale of the property, and that thereby some intending purchaser was prevented from bidding or competing: Fol-kard's Starkie on Slander and Libel, sec. 128; Odgers on Libel and Slander, 138. "This action lieth not but by reason of the prejudice in the sale": Per Fenner J., in *Bold v. Bacon*, Cro. Eliz. 346. If the plaintiff has merely a general intention to sell, or if the words uttered do not reach any intending purchaser, or if they do not prevent any sale, or are uttered after the sale is completed or agreed upon and contracted for, the plaintiff does not suffer any damage from their utterance.

It is alleged in the complaint that in August, 1888, the plaintiff was the owner of a certain leasehold interest with option and privilege of purchasing two certain tracts of land in Los Angeles County, and that one Arthur Sketchley was then negotiating and treating with him for the purchase of, and offered to purchase from him, an undivided one half of the same for the sum of twenty-five thousand dollars, "and that the plaintiff accepted said offer"; that the defendant, well knowing the premises, did willfully, maliciously, and without probable cause, during the period that the said Sketchley was so negotiating and making the offer aforesaid, and prior and subsequent thereto, publicly state to divers persons (naming them), and to the plaintiff, "that the plaintiff had broken the covenants of his said leases, and had forfeited all rights thereunder and by virtue thereof," and that the defendant would not sell to the plaintiff, or to any person purchasing from him, the lands described in said leases, or execute a deed therefor on the tender of said purchase price; that the said statement and declarations were false, and were made by the defendant for the purpose of preventing the plaintiff from disposing of said leasehold interests and option, and that said Sketchley was informed of the said statements, and was intimidated, dissuaded, and deterred from carrying out his agreement with plaintiff, and withdrew his offer to purchase, and refused to purchase the same; that but for said statements by defendant, Sketchley would have completed

said purchase, and that by reason of the said statements plaintiff has been unable to sell said property to Sketchley, and has been thereby damaged in the sum of twenty-five thousand dollars.

1. The averment in the complaint that Sketchley offered to make the purchase from the plaintiff, and to pay therefor the sum of twenty-five thousand dollars, and that "the plaintiff accepted said offer," must, for the purposes of the demurrer, under the familiar rule that the pleading is to be construed *contra proferentem*, be regarded as an allegation of a valid and efficient offer and acceptance, and that by virtue thereof a complete and executed contract of purchase and sale was entered into between them. This construction is corroborated by the subsequent averment that after Sketchley was informed of the statements of the defendant, he was "intimidated, dissuaded, and deterred from carrying out his agreement with plaintiff," and shows that it was the intention of the pleader to allege such contract.

This acceptance by the plaintiff of Sketchley's offer, and the agreement between them for the purchase and sale of the property, terminated the "treaty," and gave to the plaintiff a contract capable of being enforced against Sketchley, and on which he can recover any damages he may have sustained from its violation. The subsequent refusal by Sketchley to carry out his agreement did not give the plaintiff the right to recover in this action the damages thus sustained. In an action like the present, the plaintiff can recover only such damage as he may have sustained by reason of an intending purchaser being prevented from making the contract; but the complaint herein shows that whatever statements or declarations were made by the defendant prior to the making of the contract did not have the effect to prevent Sketchley from entering into the same, and those which he made thereafter have not caused the plaintiff any damage which can be said to have resulted therefrom. We know of no case in which it has been held that when the plaintiff has a valid contract of sale, he can recover damages for its breach against one whose words, however false and malicious, have induced the other contracting party to violate such agreement. In *Morris v. Langdale*, 2 Bos. & P. 284, in an action for defamation, the special damage alleged was that certain persons had refused to fulfill their contracts with the plaintiff in consequence of the words spoken, but Lord Eldon said: "Now, if the plain-

tiff has sustained any damage in consequence of the refusal of any persons to perform their lawful contracts with him, it is damage which may be compensated in actions brought by the plaintiff against those persons; and the law supposes that in such actions the plaintiff would receive a full indemnity." A similar principle is laid down in Townshend on Slander and Libel, sec. 206; *Kendall v. Stone*, 5 N. Y. 14; *Vicars v. Wilcocks*, 8 East, 1; *Paull v. Halferty*, 63 Pa. St. 46; 3 Am. Rep. 518; *Brentman v. Note*, 24 N. Y. St. Rep. 281.

It is not shown by the complaint whether the plaintiff accepted the refusal of Sketchley to complete his purchase as a termination of the contract, or whether he still holds his right of action to enforce the contract. From the averment that "the said Sketchley was then and there, and at all times since has been, able and willing to purchase" the property contracted for, it would seem that Sketchley is still bound by the contract, and if so, the complaint fails to show that the plaintiff has sustained any damage. In any action against Sketchley founded upon the contract, it would be no defense that he had been induced to refuse to complete his purchase by reason of the statements of the defendant alleged herein; and as in such action the plaintiff can recover all the damages he has sustained, he has no right of action herein against this defendant. If, on the other hand, the plaintiff has released Sketchley from the obligations of his contract, or does not desire to enforce the same, whatever damage he has suffered is the result of his own voluntary act, and cannot be visited upon this defendant: *Kendall v. Stone*, 5 N. Y. 14.

2. The complaint fails to show that the statements and declarations alleged to have been made by the defendant could have caused any damage to the plaintiff. It was necessary for the plaintiff to set forth and describe in his complaint the property respecting which the defamatory statements had been made, as well as to aver his title thereto, so that it might be shown wherein the defendant had done him any injury. The defamatory statements alleged to have been made by the defendant are, "that this plaintiff had broken the covenants of his said leases, and that plaintiff had forfeited all rights thereunder and by virtue thereof." The only leases referred to in the complaint are those which are annexed to it as exhibits for the purpose of identifying the lands in which the plaintiff had a "leasehold interest with option and privilege of purchasing." The plaintiff has

not alleged the nature or extent of his leasehold interest, or the terms of his option, or what were the covenants of his leases, or the nature of his rights thereunder, nor has he alleged that the covenants or the option are those which are contained in the exhibits. As the statements alleged to have been made by the defendant referred to the "covenants of his said leases and his rights thereunder," it was necessary to aver facts sufficient to show whether he had any rights, or whether there were any covenants to be violated or broken. The exhibits attached to the complaint are made a part thereof only for the purpose of identifying the lands referred to, and do not satisfy this requirement of pleading. Argumentative pleading is no more permissible under the code than it was at common law. Matters of substance must be alleged in direct terms, and not by way of recital or reference, much less by exhibits merely attached to the pleading. Whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint: *Los Angeles v. Signoret*, 50 Cal. 298.

The only property to which the plaintiff alleges that he had any title is the leasehold interest and option to purchase. He does not allege that the defendant denied his title to this property, but charges him only with disparaging certain rights which the complaint does not allege that he possessed. The allegation that the defendant had stated that he would not sell the lands described in the leases cannot be regarded as any slander of his title, even if the complaint had shown any right to make a purchase from the defendant. The plaintiff, moreover, does not allege that Sketchley was informed of this declaration of the defendant.

3. The complaint also fails to show that the special damage alleged to have been sustained by the plaintiff is the natural and direct result of the statements and declarations made by the defendant. This action is governed by the same rule that obtains in the ordinary action of slander, viz., that if the words are not actionable in themselves, the originator of the slander is only liable for such damage as is the direct and natural result of his act, and that he is not liable for the subsequent repetition of those words by another, without his direction or authority: *Folkard's Starkie on Slander and Libel*, sec. 642; *Addison on Torts*, 795; *Parkin v. Scott*,

1 Hurl. & N. 153; *Ward v. Weeks*, 7 Bing. 211; *Terwilliger v. Wands*, 17 N. Y. 54; 72 Am. Dec. 420; *Gough v. Goldsmith*, 44 Wis. 262; 28 Am. Rep. 579; *Hastings v. Stetson*, 126 Mass. 329; 30 Am. Rep. 683. This is but the application of the general rule that when special damages are to be recovered, they must be the legal and natural consequence arising from the tort itself, and not from the wrongful act of a third party, remotely induced thereby: *Crain v. Petrie*, 6 Hill, 524; 41 Am. Dec. 765. The only special damage which the plaintiff has alleged is, that Sketchley was informed of the statements and declarations made by the defendant, and withdrew his offer to purchase, and that the plaintiff thereby sustained damage. It is not alleged that the defendant ever made any statement or declaration to Sketchley, or in his presence, or that he directed or authorized any of his statements to be communicated to him, nor is it alleged that either of the persons to whom the defendant made such statements repeated them to Sketchley, or by whom or in what manner Sketchley "was informed" of the statements. The only connection between the statements by the defendant and their reaching Sketchley is, that the defendant made them for the purpose of circulating the rumor and conveying the impression that the plaintiff had violated the covenants and conditions of his leases. This, however, is too remote to render the defendant liable.

We are of the opinion that the complaint fails to state a cause of action, and that the demurrer was properly sustained, and the judgment is therefore affirmed.

SLANDER OF TITLE. — As to the nature of the procedure in, and the damages recoverable in, actions for slander of title generally, see note to *Gent v. Lynch*, 87 Am. Dec. 562, 563. Slander of title is actionable where the plaintiff has an interest or estate in the property, and another falsely and maliciously impugns his title thereto, causing him to suffer special damage: *Harriss v. Sneed*, 101 N. C. 273; *Paull v. Halferty*, 63 Pa. St. 46; 3 Am. Rep. 518. The complaint in an action for slander of title was held good as against a demurrer, which stated, in substance, that plaintiff owned realty in Georgia; that defendant without cause had falsely stated that he and others were the owners of said property, and that able counsel had decided that plaintiff had no title; that defendant had caused the publication of these falsehoods in various newspapers; that such statements were false, defamatory, and circulated to injure plaintiff and his title; and that by reason thereof plaintiff was prevented from leasing or disposing of his realty, etc.: *Dodge v. Colby*, 108 N. Y. 445.

In an action to recover for slander of title, defendant is entitled to a nonsuit, if the evidence shows that the existence of the title alleged to have

been slandered is in dispute in a prior action between the parties brought for the purpose of determining their rights: *Thompson v. White*, 70 Cal. 135. Nor can the action be maintained in the absence of malice or a willful purpose of inflicting injury on the part of the defendant: *Hovey v. Rubber T. P. Co.*, 57 N. Y. 119; 15 Am. Rep. 470.

In an action for slander of title, the defendant, by setting up title in himself, has the burden of proving such claim cast upon him: *Sully v. Spearing*, 40 La. Ann. 558.

[IN BANK.]

PICO v. COHN.

[91 CALIFORNIA, 129.]

JUDGMENT, RELIEF FROM, IN EQUITY, WHAT FRAUD JUSTIFIES. — A judgment or decree will not be set aside or annulled in equity on account of any fraud which is not extrinsic or collateral to the questions examined and determined in the original action. A fraud is not extrinsic or collateral, within the meaning of the rule, unless it is one the effect of which prevents a party from having a trial.

EQUITY — RELIEF FROM JUDGMENT. — PERJURY, THOUGH INDUCED BY BRIBERY, is not available in equity as a ground for obtaining relief from a judgment procured thereby, when such judgment was the result of the trial of an action in which the truth of the alleged perjury was necessarily drawn in question and submitted to the court for its determination, and such bribery, though suspected, could not be established in time to be made the ground of a new trial or of other relief on the former action.

Anderson, Fitzgerald, and Anderson, Del Valle and Munday, Smith, Winder, and Smith, and Oliver P. Evans, for the appellant.

A. Brunson and Stephen M. White, for the respondents.

The COURT. After a full consideration of the argument presented upon the rehearing in this cause, we are satisfied with the former decision, rendered on February 11, 1891, and for the reasons there given the judgment appealed from is affirmed.

The following is the decision above referred to, rendered in Bank on the 11th of February, 1891:—

BEATTY, C. J. This is a suit in equity to vacate and annul a final decree in another action between the same parties on the ground that it was procured by fraud. The superior court sustained a demurrer to the complaint, and thereupon gave judgment for the defendants, from which the plaintiff appeals. The principal question presented by the appeal, and the only question we find it necessary to consider, is, whether

the complaint, taken as true, presents a case entitling the plaintiff to the relief demanded, or to any relief.

It is alleged that in April, 1883, the plaintiff was owner of several parcels of real estate in Los Angeles, then worth over two hundred thousand dollars, and of still greater value now; that one parcel of the land had been sold under decree of foreclosure, and the time for redemption was about to expire; that there were other pressing liens resting upon the whole property, amounting, with the sum necessary to redeem the parcel sold, to about sixty-two thousand dollars, as then estimated; that plaintiff was anxiously endeavoring to raise money to effect such redemption and save his property from sacrifice; that one B. Cohn, since deceased, whose administrator is the principal defendant herein, offered to loan, and did loan, him the necessary sum, taking for security a grant absolute in terms of the encumbered property.

The consideration expressed in the deed was the exact sum at which the liens and encumbrances on the land were estimated,—sixty-two thousand dollars. The value of the land was, as above stated, over two hundred thousand dollars. Within a month or two after the execution of his deed, plaintiff tendered Cohn sixty-five thousand dollars, and demanded a reconveyance, which was refused, whereupon he commenced an action to compel a reconveyance, alleging in his complaint that his grant to Cohn was in fact a mortgage to secure a loan. Cohn answered, alleging that the transaction was an absolute sale.

Upon a trial of this issue the superior court found for the plaintiff, and decreed a reconveyance upon payment of one hundred and three thousand dollars, this being the amount of the sum originally advanced by Cohn, and certain additional sums which he was found to have expended subsequently in the compromise and settlement of other claims against the property. But on motion of the defendants in that action, the superior court ordered a new trial, unless the plaintiff would consent to a modification of the findings and decree, adding thirty-five thousand dollars to the amount to be paid defendants upon reconveyance of the land; and the plaintiff failing to consent to such modification, the order for a new trial was made absolute, and upon appeal of the plaintiff, was affirmed by this court: 67 Cal. 258. Thereupon a new trial was had in the superior court, but before a different judge, who found upon the principal issue in favor of the de-

fendants, and decreed against the right of redemption. From that decree and an order denying his motion for a new trial, the plaintiff again appealed to this court, where the decree and order were affirmed (78 Cal. 384) upon the ground that, the evidence being conflicting, the findings of the lower court could not be disturbed. It is to annul the decree so affirmed that the present action is brought, and the fraud by which it was procured is shown by allegations in substance as follows: At the date of the original transaction with Cohn, Pico was an old man over eighty years of age, unable to speak or understand the English language, unused to complicated statements or accounts, easily deceived, and in great distress and trouble regarding his business affairs. He confided in Cohn, relied upon him implicitly, and at his solicitation abstained from consulting his usual legal advisers. In the conduct of the negotiations with Cohn, the only other person present was one Pancho Johnson, who knew everything that took place, and well knew that the transaction was a loan and security, and not a purchase and conveyance absolute; and shortly after the execution of the deed, so stated in the presence of Pico's attorneys and numerous other persons. Relying on Johnson's knowledge of the transaction and his statements concerning it, Pico called him as a witness on the first trial of the action to redeem, when, instead of testifying that the transaction was a loan and mortgage, he testified that it was a sale and absolute conveyance; but in spite of his adverse testimony, the court, as above shown, found for the plaintiff. Before the cause came on for trial a second time, Johnson was dead; but his testimony as given on the first trial had been reduced to writing, and was on file among the papers in the case. Plaintiff and his counsel knew that this testimony was false in its general statement to the effect that the conveyance to Cohn was absolute, and they suspected that Cohn had bribed the witness to so testify; but they had no evidence of such bribery, although they had used the utmost diligence to discover it. Upon mature consideration, they decided at the second trial to put in evidence the written transcript of Johnson's testimony at the first trial. Among their reasons for doing so were the following: Other testimony in the case showed that Johnson was present during the negotiations between Pico and Cohn, not only as interpreter, but as the particular friend and adviser of the former, and counsel for

plaintiff feared that by omitting to offer Johnson's testimony they would incur the odium of suppressing evidence known to exist, whereas by putting it before the court they would have the advantage of some facts that they could prove by no other witness. They would have his admission of other facts inconsistent with the theory of a sale. The court would see that he was hostile to Pico, and he could be contradicted by proof of his statements made in the presence of others.

Without going more fully into the reasons which induced counsel for plaintiff to submit the testimony of Johnson to the consideration of the court on the second trial of the former action, we content ourselves with saying that the allegations of the complaint show that the course pursued by them was, under the circumstances, wise and proper, if not absolutely necessary. But, contrary to their expectations, the court believed his false testimony, and for that reason alone decided against the plaintiff. In support of this conclusion, the complaint sets out the substance of all the testimony of Cohn and Pico, and in detail the material portions of Johnson's testimony, from which, with other averments, it appears that but for Johnson's positive perjury and suppression of the truth, the judgment here in question would not have been given. This being shown, it is next alleged that after the final affirmance of that judgment by this court, plaintiff made the discovery that Cohn had paid Johnson two thousand dollars to testify falsely. The particulars of this bribery and its discovery are detailed in the complaint, and show that on the very morning that Johnson gave his testimony, Cohn placed two thousand dollars in the hands of one Forbes, with directions, given in Johnson's presence, to pay it to him if he testified to an absolute sale, and that, immediately after he had so testified, he demanded and received the money.

It is averred, and we think sufficiently shown, that upon proof of these facts there is a reasonable certainty that plaintiff would, upon another trial, gain his cause. Such being the case, is plaintiff entitled to a decree vacating and annulling the former decree on the ground that it was procured by fraud? After a careful and extended examination of the authorities, we are constrained to answer this question in the negative. That a former judgment or decree may be set aside and annulled for some frauds, there can be no question; but it must be a fraud extrinsic or collateral to the questions

examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is, that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party, and connives at his defeat, or being regularly employed, corruptly sells out his client's interest: *United States v. Throckmorton*, 98 U. S. 65, 66, and authorities cited.

In all such instances the unsuccessful party is really prevented, by the fraudulent contrivance of his adversary, from having a trial; but when he has a trial, he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that, necessarily, the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy. The wrong, in such case, is of course a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is, that a final judgment cannot be annulled merely because it can be shown to

have been based on perjured testimony; for if this could be done once, it could be done again and again *ad infinitum*. But counsel for appellant seek to distinguish this case from those in which it had been held that a judgment will not be set aside by reason of its being based upon forged documents or perjured testimony. They say that the fraud committed by Cohn was the bribing of Johnson; that this was collateral and extrinsic; that it was not and could not have been the subject of investigation at the trial of the original action. We do not think this distinction can be maintained. The fraud which Cohn committed was the production of perjured evidence in support of his defense. The means by which he induced the witness to swear falsely was but an incident.

It may be safely asserted that a witness does not often deliberately perjure himself without being induced thereto by some fraudulent or corrupt practice on the part of him who gets the advantage of the perjury. It is a matter of indifference what particular form such corrupt practice takes. The evil and the wrong is in the perjury which follows. In this case the truth of Johnson's evidence was necessarily drawn in question at the trial, and determined by the decision of the court; and all that has since been discovered is another item of testimony bearing on that point. We cannot find any substantial ground upon which this case can be distinguished from *United States v. Throckmorton*, 98 U. S. 65, 66. The decision in that case has been approved by this court as recently as in *In re Griffith*, 84 Cal. 113. The following decisions of this court are also in point: *Allen v. Currey*, 41 Cal. 321; *Amador Canal etc. Co. v. Mitchell*, 59 Cal. 176. Many other authorities to the same effect are cited in the brief for respondents. On the other hand, the case of *Laithe v. McDonald*, 7 Kan. 254, 12 Kan. 340, directly supports the position of appellant, as does the case of *Fabrilius v. Cock*, 3 Burr. 1771. The cases of *Verplanck v. Van Buren*, 76 N. Y. 247, and *Dringer v. Erie R'y Co.*, 42 N. J. Eq. 573, contain expressions which seem to imply the same doctrine, but they do not directly support it. Other cases cited by appellant are less in point.

We think, on the whole, that it is settled by the great weight of authority that the plaintiff's action cannot be maintained, and that the judgment of the superior court must be affirmed. So ordered.

Relief from Judgments Obtained by Perjury.*

RELIEF FROM JUDGMENTS OBTAINED BY PERJURY. — The question whether or not relief in equity may be had from a judgment on the suggestion it was obtained through perjury and subornation of perjury was fearlessly met in the principal case, and the rule deduced by court from the pre-existing adjudications upon the subject applied under circumstances which might well have induced the court to falter in its application, or to dispose of the appeal upon some other ground. As the evidence alleged to have been procured by subornation of perjury was introduced by the complainant himself to obtain the benefit of such parts of it as were favorable to him, with knowledge of its falseness in other respects and the belief that it was also suborned, he might have been denied relief on the ground that when he deliberately offered the evidence he could not reasonably expect to obtain judgment in his favor if the court disbelieved those parts which he alleged to be false, and at the same time to be entitled to have the judgment against him set aside if the court believed those parts to be true. If the complainant could put himself in this position, it was not possible for him, in any event, to finally fail in his controversy, while it was possible for him to succeed immediately if the trial court believed such parts of the evidence as he wished to have believed, and discredited all he wished to have discredited. The opinion of the appellate court did not, however, proceed upon this ground, but rather upon the broad rule that under no circumstances will relief in equity be granted against a domestic judgment on the ground of perjury or subornation of perjury, where both parties were represented at the trial and had an opportunity to offer evidence upon the issue, the decision of which was controlled by the alleged perjured testimony. We say, under no circumstances, because the decision was upon demurrer, and the facts necessarily conceded by the demurrer were so extreme in their character that it is not possible to conceive of circumstances giving a complainant any higher or better claim to relief than those alleged in his complaint.

Cases Favoring the Granting of Relief. — The only American case precisely in point was not noticed in the opinion of the court, and was not, we think, called to its attention. We refer to *Peagram v. King*, 2 Hawks, 295, 605, 11 Am. Dec. 793, decided upon demurrer to the bill in 1822, and upon final hearing in 1823. It appeared that an action of detinue had been brought to recover certain negroes, and a verdict had been obtained in favor of the plaintiff therein, through the evidence of one Jenks; that in giving such evidence he perjured himself, and that the inducement to his perjury was the promise by the plaintiff to give him one of the negroes in the event of success; that afterwards, Jenks, becoming mortally ill, on his death-bed confessed his perjury; that though the defendant had moved for a new trial he was unable to obtain any evidence of Jenks's perjury in time to be used on the motion, and that after the motion had been disposed of, the defendant, for the first time, discovered a witness by whom he could prove the facts upon which he relied for relief. A motion to dismiss the bill for want of equity was denied, and the defendant required to answer: 2 Hawks, 295. This he did, and in so doing denied all the material allegations of the bill. The issues formed by the bill and answer having been submitted to a jury and found in favor of the complainant, the plaintiff in the former action was required to submit to a new trial. The rule of law which the court sup-

* REFERENCE TO MONOGRAPHIC NOTES.

Judgments, power of equity to relieve from: 19 Am. Dec. 603-612.

Judgments, what are collateral attacks upon: 23 Am. St. Rep. 104-119.

posed to control its decision, and the reasons for the rule, were thus stated: "It is, in general, true, both at law and in equity, that a new trial will not be granted on the ground of newly discovered evidence when it goes merely to impeach the testimony of a witness at a former trial, nor to let in cumulative evidence as to matter which was principally controverted at the former trial; but that is very different from the newly discovered evidence which goes utterly to destroy the former testimony and cut it up by the root, by showing that it was founded in perjury. Accordingly, both courts furnish instances of a new trial being granted for the latter cause. A new trial was granted upon the ground that the testimony was a fiction, supported by perjury, which the defendant could not be prepared to answer, and that circumstance had been discovered since the trial to detect the iniquity: 3 Burr. 1772. And in a court of equity, if new evidence is discovered which could not possibly be made use of in the first trial, the court will interfere: 1 Ch. Cas. 23. No evidence could have been given of the dying declarations of Jenks, wrung from him in an agony of remorse, when he had no motive to misrepresent; for the complainant shows (as far as such a fact can be affirmatively established) that he knew not by whom to prove it until after the trial, when Peter Avent gave him the information. It is admitted (Prec. Ch. 193) that if a witness, on whose testimony a verdict has been given, was convicted of perjury, a new trial may be granted. The death of Jenks before the complainant knew by what witness his declaration could be shown rendered a prosecution impossible, and brings this case within the reason of the decision."

This opinion is based chiefly upon the early English case of *Fabrilus v. Cock*, 3 Burr. 1771. It is not, however, necessarily supported by any American case, though there are decisions in some of our courts which are sometimes cited as being in harmony with it. The principal of these is to be found in the two opinions of the supreme court of Kansas, in the case of *Laithe v. McDonald*, 7 Kan. 254; 12 Kan. 340. It is true that relief was granted in that case on the ground of the perjury of the plaintiff, but the relief was not obtained upon an ordinary bill in equity, nor did the court, in granting relief, profess to be guided by the rules of courts of equity. The action was one authorized to be brought by section 568 of the code of the state for "fraud practiced by the successful party in obtaining a judgment." The fraud consisted in the fact that the plaintiff testified falsely, but it was further alleged that the defendants were not present at the trial, and that no other testimony than that of the plaintiffs was given thereat. While the absence of the defendants at the trial of the cause was declared, in the opinion, not to entitle them to relief on the statutory ground of "unavoidable casualty or misfortune," yet it apparently largely influenced the final decision. The court, after referring to the statute of the state, and the circumstances under which the application for relief was made, said: "Hence, if a decision in equity should be found in any state against granting relief in such causes, it would not be a decision that a party has no remedy, nor that he has not the remedy which McDonald and brother now seek in this case. The relief in equity was different from that now granted under our statute. Equity did not grant a retrial in a court of law, as our statute does. And hence courts of equity should have been more cautious in granting relief in such cases than courts of this state should under our statute. Under the statute, a new trial is granted in the action at law in the same court, and an opportunity is afforded of having a full and fair trial before a jury. . . . We think that McDonald and brother have clearly shown a right to the relief they ask,

under the statute, and therefore the judgment of the court below must be affirmed."

Jordan v. Volkenning, 72 N. Y. 300, was an action brought against the sureties upon an undertaking given to procure the issuing of a preliminary injunction, to recover damages alleged to have been suffered from such injunction. The action on which the injunction issued had been dismissed, and by the judgment therein a referee had been appointed to assess the damages resulting from the injunction. Notice of the hearing before the referee was given to the plaintiff in the original action, but he paid no attention to it, and the sureties had no notice whatever. No one appeared before the referee except one of the defendants, who, upon being sworn, testified that the value of the use of certain premises during the time which he was prevented from using them, by means of the injunction, was four thousand dollars per annum, and the assessment by the referee was in accordance with such evidence. In the action against the sureties, they pleaded that the plaintiffs therein "procured such assessment by false, fraudulent, and collusive representation and allegation on their part that the value of the use of such premises mentioned in said complaint was four thousand dollars per annum, when in truth and in fact the value of the use of the same during the time the said undertaking was in force did not exceed five hundred dollars per annum, and the said false, fraudulent, and collusive allegations on the part of said plaintiff were a fraud upon the court." At the trial, evidence of the value of the use of the premises having been offered to sustain the allegation of fraud, the court excluded it, but this was declared by the court of appeals to be error, in an opinion in which it said: "There can be no question that a judgment or award obtained by false testimony, fraudulently given by a party benefiting thereby, is voidable; and we think gross exaggeration of value, knowingly and willfully made, especially in the absence of the adverse party, would be sufficient evidence of fraud to invalidate a judgment or assessment of damages." It will be observed that in this as well as in the Kansas case the parties seeking relief were not present at the trial, and did not offer any evidence on the issue which they claimed to have been supported by the perjured evidence of their adversaries, and in the New York case that the complainants had no knowledge or notice of the hearing at which the evidence was taken for the purpose of assessing the damages for which they, as sureties, were sought to be held responsible. Neither of these cases can, therefore, be treated as a conclusive, or even as a pertinent, authority, when relief is sought from a judgment entered upon a trial on the merits upon conflicting evidence at which the party seeking relief was present, and in which he participated.

Cases Denying Relief.—There is little or no doubt of the truth of the proposition stated in the principal case, that, to entitle a party to relief in equity on the ground of fraud from a judgment entered against him, he must establish "that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy": Freeman on Judgments, 4th ed., sec. 489; *Amador etc. Co. v. Mitchell*, 59 Cal. 179; *United States v. Throckmorton*, 98 U. S. 68; *In re Griffith*, 84 Cal. 113. While we yield our assent to the conclusion reached in the principal case, we do not think it supportable on the ground that the fraud complained of was not an extrinsic or collateral fraud. The subornation of a witness is, in our judgment, as much a collateral or extrinsic fraud as is the keeping of a party away from the court by a false promise of compromise, or purposely keeping him in ignorance of the suit, or corrupting his attorney. Neither party has a right

to do anything which will prevent the other from having a fair trial of their controversy on the merits, and any unlawful device resorted to for this purpose and with this effect is, we think, an extrinsic or collateral fraud. Perhaps a majority of honest litigants who fail in their litigation believe that their failure is due to the perjury of their adversary or of his witnesses, and that the latter, if perjured, were also suborned. Therefore, if a controversy may be reopened by tendering an issue as to such perjury or subornation of perjury, it would be continued indefinitely, or until one or both of the parties had exhausted their means of continuing it; and should the original judgment be reopened on the ground of alleged perjury, the decree reopening it ought in turn, upon the same principle, be subject to attack upon the same ground. Hence we judge that the reason of the rule of the principal case must be found in those considerations of public policy which require some line to be drawn beyond which no further litigation can take place: *Greene v. Greene*, 2 Gray, 361; 61 Am. Dec. 454; *Gray v. Barton*, 62 Mich. 196; *United States v. Throckmorton*, 98 U. S. 61; *Hass v. Billings*, 42 Minn. 67.

The first American case in which relief was sought on account of subornation of perjury was *Smith v. Lowry*, 1 Johns. Ch. 320; followed in *Woodworth v. Van Buskerk*, 1 Johns. Ch. 432. The complainant alleged that he had not been able to be present at the trial of the action brought against him; that at such trial the damages recoverable had been assessed upon the testimony of a witness; and that since the motion for a new trial had been denied in the action at law, the complainant had discovered that the evidence of the witness had been procured by subornation, and that it was founded upon a fictitious sale contrived for the occasion. In denying relief, the chancellor said: "The cases of relief in equity against judgments at law founded in fraud are when the fraud goes to the whole judgment, and not a mere excess of damages in actions properly sounding in damages, and when the fraud could not have been met and defeated at the trial. It would be setting a precedent most inconvenient for the public for this court to interfere in a case like this, of the alleged perjury of a witness on a question as to the amount of damages, and to provide for a new trial when an application for a new trial had already been denied at law, and when courts of law exercise a most liberal and equitable discretion on the subject of new trials, and when the injury complained of is, in a great degree, to be imputed to the party's own want of preparation." In a later case in the same state, the plaintiff alleged that in an action commenced against him to set aside, as fraudulent and void, a deed made to him by Sarah Wood, she and her witnesses colluded and confederated together to cheat and defraud plaintiff by perjury and false testimony, and that in pursuance of their conspiracy, she and they testified falsely in various particulars, which were set forth, and thereby procured a verdict and judgment setting aside the deed, and the plaintiff prayed that such judgment be annulled. The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and the demurrer was sustained: *Ross v. Wood*, 76 N. Y. 8. In this case there was no allegation of newly discovered testimony or of any subornation of perjury, and nothing to indicate that if the demurrer had been overruled and an answer to the complaint required, the issues formed by such answer would not have been supported by precisely the same evidence as that received at the former trial. The case of *Folsom v. Folsom*, 55 N. H. 78, was also one in which relief from a former judgment was sought on the ground of perjury of the adverse party and one of his

witnesses, but there was no allegation of newly discovered evidence, and the relief was denied. *Greene v. Greene*, 2 Gray, 361, 61 Am. Dec. 454, was a libel for divorce which sought to avoid the effect of a previous decree of divorce against the complainant by alleging that such decree was obtained by fraud and false testimony. The right to thus attack the former decree was denied, the court remarking that "if a new and original libel may be brought upon the ground that the former decree was obtained by false evidence, we see nothing to prevent the husband from bringing a third suit to reverse the decree of reversal, on a suggestion and offer of proof that the decree of reversal was obtained by perjury, subornation of perjury, and other fraud, and thus reverse the second decree and reinstate the original decree of divorce"; and that "we have seen no reliable authority opposed to the position above taken, that a decree of divorce *a vinculo*, where no appeal, review, or writ of error is allowed by law, or when the time for bringing such review or writ of error has expired, is final and conclusive upon the parties, and that an original proceeding to set it aside on the ground that it was fraudulently obtained by false evidence cannot be maintained."

In a comparatively recent case in Michigan, the complaint, among other grounds of relief, alleged that, at the trial of the former action, the defendant and his son swore falsely. In considering this allegation the court said: "But it does not seem to me that the mere allegation that the defendant committed perjury upon the trial, and the belief of the complainant that he can establish such perjury upon a retrial, is such a fraud as will authorize a court of equity to interfere, after the judgment against him in a court of law has been affirmed by the highest tribunal. The establishment of such a right in the defeated party would open the way for another contest in equity in almost, if not in every, suit decided at law. There is scarcely a controversy in the courts in which there is not a conflict of testimony, and there are quite often charges of false swearing, and seldom is a case tried and decided in which new evidence cannot be obtained after people suppose it to be ended": *Gray v. Barton*, 62 Mich. 196.

The most important and decisive case upon this side of the question is that of *United States v. Throckmorton*, 98 U. S. 61. It was a bill in chancery for the purpose of setting aside a decree of confirmation of a Mexican grant. The fraud relied upon, as alleged in the bill, was, that Richardson, in whose favor the decree of confirmation was had, during the pendency of the proceedings for confirmation, became satisfied that he had no sufficient evidence of the grant or concession under which he claimed; that, to supply this defect, he visited Mexico and obtained from Micheltorena, former governor of California, his signature to a grant, and falsely antedated it so as to impose on the court the belief that it was made while Micheltorena had power to make it; and that, in support of this false document, Richardson procured and filed therewith the depositions of perjured witnesses. In the circuit court, a demurrer to the bill was sustained, and a judgment thereupon entered dismissing it. In affirming this decree of dismissal, the supreme court thus, in our judgment, correctly stated the true ground upon which its action was supportable: "That the mischief of retrying every case in which the judgment or decree rendered on false testimony given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases. The case before us comes within this principle. The genuineness and validity of the

concession from Micheltorena produced by complainant was the single question pending before the board of commissioners and the district court for four years. It was the thing, and the only thing, that was controverted, and it was essential to the decree. To overrule the demurrer to this bill would be to retry, twenty years after the decision of these tribunals, the very matter which they tried on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent combination in this suit to defeat the ends of justice; and so the number of suits would be without limit and the litigation endless about the single question of the validity of this document." This decision has been followed and frequently applied by subordinate national courts: *Cotzhausen v. Kerting*, 29 Fed. Rep. 821; *Hilton v. Guyott*, 42 Fed. Rep. 252; *United States v. White*, 17 Fed. Rep. 561; *United States v. Hancock*, 30 Fed. Rep. 858.

Section 285 of chapter 66 of the General Statutes of Minnesota of 1878 provides "that in all cases where judgment heretofore has been, or hereafter may be, obtained in any court of record by means of perjury, subornation of perjury, or any fraudulent act, practice, or representation of the prevailing party, an action may be brought by the party aggrieved to set aside the said judgment at any time within three years after the discovery by him of such perjury, subornation of perjury, or of the facts constituting such fraudulent act, practice, or representation." With respect to this statute, the courts of that state have decided that "it is in derogation of the well-established principle and policy of the common law which forbids the retrial of issues once determined by a final judgment, and should not therefore be so construed as to extend its operation beyond its most obvious import": *Stewart v. Duncan*, 40 Minn. 410; that as to judgments rendered after its enactment, the statute is constitutional, but, being in derogation of the common law, it should be strictly construed; that there may be cases under which a party is entitled to relief under it, as where an aggrieved party may be defrauded, "notwithstanding any amount of diligence on his part in preparing for trial": *Spooner v. Spooner*, 26 Minn. 137; *Hass v. Billings*, 42 Minn. 69; that "when an issue is squarely made in a case, so that each party knows what the other will attempt to prove, and neither has a right, or is under any necessity, to depend on the other proving a fact to be as he himself claims it, the mere allegation by a defeated party that there was, as to such issue, false and perjured testimony of the successful party or his witnesses, will not bring his case within the meaning of the statute": *Hass v. Billings*, 42 Minn. 67.

Each of the cases to which we have referred differed in some respect, and perhaps in some essential respect, from the principal case, and it might have been determined the other way without being necessarily irreconcilable with any of them. In most, if not in all, of them the court was apparently somewhat influenced by the complainant's obvious want of diligence, and the fact that he might have made innocuous the alleged perjury had he given reasonable attention to his business, or by the consideration that he had been guilty of gross laches in not sooner discovering the evidence of such perjury or subornation of perjury and bringing it forward as a ground of relief, or that, without any newly discovered evidence, he was, in effect, seeking to retry an issue already tried and determined, upon the same evidence, by another and equally competent tribunal. As in the principal case there was no witness, aside from the parties to the action, except the one

alleged to have been suborned, no amount of diligence could have rendered his testimony harmless; no laches could be imputed to the plaintiff in not sooner discovering the evidence of the subornation of perjury, and the evidence alleged to have been discovered was such as to destroy the force of the testimony of the suborned witness, should a new trial take place after its discovery. The principal case is therefore probably the only one which necessarily implies that, under no circumstances, in the absence of a statute authorizing it, will a court of equity grant relief from a domestic judgment on the ground of perjury or subornation of perjury, where the parties were present or represented at the trial, and the issue upon which the perjury is alleged to have been committed was the chief issue in the case, upon which both parties offered evidence, and upon which each must have known, from the pleadings, that his adversary intended to offer evidence in conflict with that which he claimed to be a true account of the transaction in controversy.

Various attempts have been made to obtain redress for alleged perjury and subornation of perjury without invoking courts of equity, as by instituting actions against the successful party to a previous litigation, or against his witnesses, to recover damages attributed to his or their perjury, or by pleading such perjury or subornation of perjury as a defense to an action on a judgment. So far as we are aware, there is an entire unanimity of judicial opinion upon this subject, all the courts declaring that such an action or defense cannot be entertained while the former judgment remains free from any action or proceeding impairing its original force: *Smith v. Lewis*, 3 Johns. 157; 3 Am. Dec. 469; *Cunningham v. Brown*, 18 Vt. 123; 46 Am. Dec. 140; *Dunkap v. Glidden*, 31 Me. 435; 52 Am. Dec. 625; *Peck v. Woodbridge*, 3 Day, 30; *Demerit v. Lyford*, 27 N. H. 541; *Lyford v. Demeritt*, 32 N. H. 234; *Cottle v. Cole*, 20 Iowa, 481.

DYER v. LEACH.

[91 CALIFORNIA, 191.]

A COLLATERAL ATTACK ON A JUDGMENT OR ORDER cannot be successful unless such judgment or order is void.

TRUSTS — POWER OF COURT, WITHOUT NOTICE, TO APPOINT NEW TRUSTEE.

—The jurisdiction of a court to appoint the successor of a deceased trustee is a *quasi* jurisdiction *in rem*, capable of being exercised without giving any notice to any person interested in the trust. Therefore, the appointment of a new trustee is valid, though made without notice to the trustor or his successor in interest.

Paris and Fox, and W. J. McIntyre, for the appellants.

H. C. Hibbard, and Curtis and Otis, for the respondent.

McFARLAND, J. Action of ejectment to recover a certain tract of land. Judgment went for plaintiff, and defendants appeal.

George Leach, being the owner of the land in question, executed a deed of trust of the same to E. Conway, trustee. The object of the trust was to secure a promissory note for

\$3,358, made by Leach to the Riverside Banking Company, as well as certain other moneys. It was provided in the deed that if the money should not be paid when due, the trustee should sell the land, after notice, and in the manner provided therein, and execute a deed to the purchaser. It also provides that there shall be a trustee as successor of said Conway, in case of the death, resignation, or removal of the latter; but it does not provide for the manner in which such successor shall be appointed. Afterwards, said Conway died; and the money secured by the trust being due and unpaid, said banking company made written application to the superior court for the appointment of a trustee, and the court appointed, as such trustee, H. C. Hibbard. Hibbard proceeded under the trust, and sold and conveyed the land to one Rosenthal, who conveyed to plaintiff, Dyer. The defendants, other than Leach, are persons who claim parts of the land under him.

It is not contended by appellants that Hibbard did not sell the land in accordance with the deed of trust, or that he in any way violated it. It is contended, however, that all proceedings by him, and his sale of the land, were invalid, because his appointment was made by the superior court without notice to the trustor, Leach, or his grantees. It does not appear that any injustice has been done, and the point seems to be entirely technical.

As the attack made here upon the order of the court appointing Hibbard trustee is collateral, it cannot be successful unless such order is absolutely void; but we do not think it void. The current of authorities is to the point that in such a case it is discretionary with the court what, if any, notice shall be given. Our code requires no notice. Section 2287 of the Civil Code provides that "the superior court may appoint a trustee whenever there is a vacancy, and the declaration of trust does not provide a practical method of appointment." Section 2251 provides that "the mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission." Section 2252 provides that "when a trustee is appointed by a court, . . . such court . . . is the trustor, within the meaning of the last section." These are the only provisions applicable to the question to which our attention has been called. The theory of the law is, that upon the death of the trustee the trust vests in the court, and, in the absence of a

statutory provision, notice is not necessary to confer jurisdiction. In *Milbank v. Crane*, 25 How. Pr. 193, it is said that the jurisdiction in such a case is "a *quasi* jurisdiction *in rem*, a power over the trust, and is not acquired by the service of process upon the *cestui que trust* or other person interested in the trust fund or its preservation. It is undoubtedly proper and usual in most cases to call those more immediately interested before the court, that they may be heard in the appointment of a new trustee. But this is in the discretion of the court. . . . This being so, the appointment of the new trustee is valid, even though it should be thought to be irregular, or even improvident or indiscreet, to make the appointment without formal notice to and summons to those interested." To the same point are the cases of *Hawley v. Ross*, 7 Paige, 103, and *In re Robinson*, 37 N. Y. 261. We have considered the point upon the theory that no notice was given of Hibbard's appointment; but it is doubtful if the record shows such want of notice.

Appellants contend that the court erred in sustaining an objection to their offer to introduce the pleadings in a certain action entitled *Riverside Banking Co. v. George Leach et al.*,—the objection made being that it was not between the same parties and was irrelevant and incompetent; that there was no *lis pendens*, etc. As to this point, it is sufficient to say that there is nothing in the record to show the character of that action,—what it was about or who the parties were. There are no other points necessary to be noticed.

The judgment and order denying a new trial are affirmed.

JUDGMENT — COLLATERAL ATTACK. — Unless a judgment is void, it cannot be collaterally attacked, although it may be voidable: *Kingman v. Paulson*, 126 Ind. 507; 22 Am. St. Rep. 611, and note. A judgment cannot be collaterally attacked for either fraud or error: *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95, and note. A void decree can be collaterally attacked: *Hoffman v. Hoffman*, 46 N. Y. 30; 7 Am. Rep. 299, and note. See extended note to *Hahn v. Kelly*, 94 Am. Dec. 762-770. A judgment void for want of proper service by publication is subject to collateral attack: *Chase v. Kaynor*, 78 Iowa, 449. See *Axman v. Denken*, 45 Kan. 745. What is a collateral attack on a judgment: See note to *Morrill v. Morrill*, 23 Am. St. Rep. 104-119.

TRUSTS — POWER OF COURT TO APPOINT TRUSTEE. — Trustees having died, a court of chancery will appoint a trustee to carry out the trust: *Bull v. Bull*, 8 Conn. 47; 20 Am. Dec. 86, and note. See note to *Dashiell v. Attorney-General*, 9 Am. Dec. 585; *Royce v. Adams*, 123 N. Y. 402; *Warren v. Howard*, 99 N. C. 190; *Connell v. Cole*, 89 Ala. 381.

STANTON v. FRENCH.

[91 CALIFORNIA, 274.]

EXECUTION — EXEMPTION. — ONLY THOSE ARTICLES SPECIFIED IN THE STATUTE can be held as exempt from execution. Therefore, the bread-box of a peddler of bread, however necessary to his calling, is not exempt, when it is not specified in the statute among the things there enumerated as exempt.

EXECUTION — EXEMPTION. — THE WORD "HABITUAL," as used in a statute exempting the horse and wagon by which a debtor habitually earns his living, does not mean exclusively; and the fact that he may have, to a limited extent, applied his team to other uses, or that some part of his living may have come from some other avenue of industry, cannot deprive him of his rights as a peddler.

JURY TRIAL. — A JURY WILL BE PRESUMED TO HAVE OBEYED the instructions of the court, and to have disallowed every item which, under such instructions, ought not to be included in their verdict.

T. C. Law, J. K. Law, and Tupper and Tupper, for the appellant.

Frank H. Farrar, and Breckinridge and Peck, for the respondent.

GAROUTTE, J. This is an action in conversion, brought to recover the value of two horses, a wagon and harness, and a bread-box.

The property was taken and sold by defendant, as constable, under an execution against plaintiff and his wife; plaintiff demanded a return of the property, as exempt from execution under subdivision 6 of section 690, Code of Civil Procedure, claiming that as a peddler of bread he habitually earned his living by the use of said property. This is an appeal by defendant from the judgment and order denying his motion for a new trial. It is the second appeal to this court, the former decision being found in 83 Cal. 194. Plaintiff bases his claims for exemption upon his *status* as a peddler of bread. In the list of property allowed peddlers by statute as exempt from execution, we find no article answering in name or use to a bread-box, and a debtor's claims are limited by the words of the statute. Upon an inspection of the record in the previous appeal, we find no material difference in the evidence there and that which is now before us, upon the matter of the ratification by plaintiff of the sale by the officer, and the former decision upon that point establishes the law of the case.

It appears that plaintiff and his wife conducted a bakery,

upon a limited scale, in the town of Merced; that they sold bread at the shop, and also the plaintiff daily peddled bread throughout the town, and at the railroad depot upon the arrival of trains, etc. In the interim the plaintiff did odd jobs with his team for hire, but his principal business was peddling bread, with the use of his horses and wagon. Can it be said that plaintiff habitually earned his living by peddling? Webster defines "habitually" as "customarily; by frequent practice or use." It does not appear to mean "exclusively" or "entirely," and the fact that plaintiff may have, to a limited extent, applied his team to other uses, or that some portion of his living, however slight that portion may have come from some other avenue of industry, would not deprive him of his rights as a peddler under the statute.

This question, as well as the question as to the ownership of the bay horse, were questions of fact, and were submitted to the jury under proper instructions; there is sufficient evidence upon both matters to support the verdict, and it will not be disturbed by this court.

It does not seem necessary to enter into a discussion as to the liability of defendant for plaintiff's attorneys' fees in this action.

Plaintiff claimed the value of the property converted to have been \$350, and, in addition thereto, asked judgment for legal interest thereon from January 27, 1887, and damages in the sum of \$150 for attorneys' fees incurred in the pursuit of the property. In his testimony he placed a value of thirty-five dollars upon the bread-box. The jury returned a verdict in favor of plaintiff for \$375. The court instructed the jury that before the plaintiff could recover any amount as attorney's fee, he must show by a preponderance of evidence that such amount was a reasonable fee for the services rendered. There was no evidence whatever as to the reasonableness of the attorney's fee claimed, and it must be presumed that the jury followed the instruction of the court, and by their verdict rejected all claims in that respect. Especially should such be deemed the fact, when the evidence as to the value of the property converted, considered in connection with the interest due, would support a verdict for an amount considerably greater than the sum returned by the verdict of the jury.

The matters already passed upon dispose of many of the exceptions to instructions refused by the court. The instructions given appear to be a full and complete presentation of

the law upon all matters involved, and we see no ground upon which a successful exception thereto can be based.

Let the cause be remanded, with directions to the lower court to modify the judgment by striking therefrom the sum of thirty-five dollars, and in all other respects let the judgment and order be affirmed.

EXECUTION — EXEMPTION. — Such articles as are mentioned in the statute are exempt from execution: *Gilman v. Williams*, 7 Wis. 329; 76 Am. Dec. 219, and note. Where the statute provides that property of a certain value is exempt, no more will be exempt: *Paddock v. Lance*, 94 Mo. 283. See *In re McManus*, 87 Cal. 292; 22 Am. St. Rep. 250, and note.

EXECUTION — EXEMPTION. — For the construction of the phrase "one who habitually makes his living by the use of a team," see *Brusie v. Griffith*, 34 Cal. 302; 91 Am. Dec. 695, and note.

MILLER v. SEARS.

[91 CALIFORNIA, 282.]

ESCROW, WHAT IS NOT. — There can be no escrow until there is an actual contract of sale on the one side and of purchase on the other. Unless both parties have definitely assented to the contract, the instrument executed by the proposed grantor, though in form a deed, is neither a deed nor an escrow.

ESCROW. — A DEED CANNOT BE REGARDED AS AN ESCROW if the title of the property remains to be settled to the satisfaction of the contracting parties.

ESCROW. — IF A DEED IS GIVEN BY A GRANTOR TO A THIRD PERSON to be delivered when "everything is all right and perfect," and there is nothing to indicate that the matter is to be settled otherwise than by the future agreement of the parties, it is not an escrow; and the person having the custody of the deed is a mere depository, subject to the future orders of the grantor, and without right to deliver the deed until notified by the grantor that the title is satisfactory to him.

Gould and Stanford, for the appellant

Albert M. Stephens and E. W. Sargent, for the respondents.

DE HAVEN, J. This is an action to recover the possession of certain described instruments, consisting of a note, mortgage, and two deeds, each signed by the plaintiff, and alleged to have been deposited with the defendants.

The plaintiff was nonsuited, and the question before us is, whether the testimony of plaintiff was such as to show that the documents in controversy were delivered by him to defendants in escrow, as claimed by them.

We think the fair import of the testimony is to the effect

that plaintiff had made an agreement, subject to further consideration as to title, with one Stimson and a Mrs. Buttner, for the purchase of certain property from them, and the sale by him of certain lots to them, and as part of this transaction the note, mortgage, and deeds of plaintiff, and the deed of Stimson and Mrs. Buttner for plaintiff, were signed and left with defendants, to be delivered "when everything was all right and perfected." Upon this point the plaintiff testified: "I said to Mr. Sears: 'You take these papers, and when everything is all right and perfected, you give these papers to me, and these others to him.' That was the agreement. . . . The transaction was not completed on that day, because we had no abstract of title at the time; we knew nothing about the titles, and we had to leave that to after-consideration. If it had been perfect, of course we should have handed over the papers." Upon this state of facts, it cannot be held that plaintiff's papers were delivered to the defendants as an escrow. There was no contract of sale concluded between the plaintiff and the other parties to the negotiation, as the question of title remained to be settled to the satisfaction of the contracting parties. This fact alone is fatal to the contention of respondents that they held the documents in controversy as an escrow. The law upon this point is very clearly stated by Mr. Justice Rhodes, in delivering the opinion of this court in *Fitch v. Bunch*, 30 Cal. 209, as follows: "An escrow differs from a deed in one particular only, and that is, the delivery. Not only must there be sufficient parties, a proper subject-matter, and a consideration, but the parties must have actually contracted. . . . The actual contract of sale on the one side, and of purchase on the other, is as essential to constitute the instrument an escrow as that it be executed by the grantor; and until both parties have definitely assented to the contract, the instrument executed by the proposed grantor, though in form a deed, is neither a deed nor an escrow; and it makes no difference whether the instrument remains in the possession of the nominal grantor or is placed in the hands of a third party, pending the proposals for the sale or purchase."

But in addition to this, we do not think that it can be held, upon the facts above stated, that the defendants were given the right to deliver these papers without further direction from the plaintiff. The delivery was not absolute and beyond the control of the plaintiff. There was to be no delivery to

the other parties until "everything was all right and perfected," and as there is nothing in the evidence to indicate that this matter was to be determined except by the future agreement of the parties themselves, it follows that defendants held the documents in controversy as mere depositaries subject to the future direction of the plaintiff, and were not authorized to do anything with them until notified by plaintiff that he was satisfied with the title he was to receive. For this reason, also, it must be held that the evidence does not show a delivery of these instruments in escrow: *James v. Vanderheyden*, 1 Paige, 386.

It follows from the foregoing views that the court erred in granting the motion for nonsuit.

Judgment and order reversed.

DEEDS — ESCROW. — A writing placed in the hands of a third person to be delivered on the happening of a specified contingency is an escrow: *Wight v. Shelly R. R. Co.*, 16 B. Mon. 4; 63 Am. Dec. 522, and note; *Cannon v. Handley*, 72 Cal. 133; *Marshall v. Bliss*, 82 Mich. 518; *State Bank v. Evans*, 3 Greenl. 155; 28 Am. Dec. 400, and note; *Jackson v. Catlin*, 2 Johns. 248; 3 Am. Dec. 415. It constitutes a delivery in escrow for one person to sign a note as surety upon the express condition that another's signature is also obtained, and to deliver the note to the maker for that purpose: *Perry v. Patterson*, 5 Humph. 133; 42 Am. Dec. 424, and note. Leaving a deed by a grantor in the hands of his agents awaiting the arrival of certain funds of the grantee does not make such deed an escrow: *Wier v. Batdorf*, 24 Neb. 83.

BLAISDELL v. McDOWELL.

[91 CALIFORNIA 285.]

CHATTEL MORTGAGE TO SECURE PURCHASE-MONEY, WHAT IS. — A chattel mortgage to secure the repayment of money given the mortgagor with which to purchase the articles mortgaged is a mortgage to secure the purchase-money, within the meaning of the section of the Civil Code of California authorizing the mortgaging of certain chattels "when mortgaged to secure the purchase-money of the articles mortgaged."

L. L. Boone, for the appellant.

M. S. Babcock, for the respondent.

McFARLAND, J. The main question in this case — and the only one requiring notice — is, whether a certain mortgage of hotel furniture, executed by George W. Butterfield and William P. Baker to Bryant Howard, is valid under section 2955 of the Civil Code.

The facts in the case are these: Butterfield and Baker, be-

ing desirous of purchasing about fifteen hundred dollars' worth of furniture for the Arlington Hotel, in San Diego, made arrangements with Howard to advance the money with which to buy the furniture, agreeing to give him a mortgage on the same as security. It was specially understood between them that the money to be advanced by Howard was to be used by Butterfield and Baker in purchasing said furniture. For this purpose, Howard deposited fifteen hundred dollars in bank to their credit, and they paid for the furniture by drawing checks against said deposit. When the furniture was in the hotel they gave the mortgage to Howard, the mortgage being in form as provided by the code, and duly recorded.

Said section 2955 of the Civil Code provides that "mortgages may be made upon: . . . 8. Upholstery and furniture used in hotels, lodging or boarding houses, when mortgaged to secure the purchase-money of the articles mortgaged"; and appellant (defendant in the court below) contends that the mortgage here in question was not given to secure the "purchase-money" within the meaning of that section. His contention is, that as, under the general rule, mortgages of personal property are void unless there is a change of possession, the statutory provision which alters that rule must be strictly construed, and applied only to cases where the mortgage runs directly from the purchaser to the seller to secure the amount agreed to be paid by the former to the latter. But if the statute is to have a literally strict construction, it is difficult to see why the phrase "to secure the purchase-money" does not as closely apply to money by which the purchase was made as to the case of a debt where no money was used. But the section of the code in question should have a reasonable construction, with a view of executing the evident design of the legislature in enacting it. While the language used should not be strained to include cases clearly not embraced by it, the meaning to be given to it should not be so narrowly circumscribed as to exclude cases clearly within it. The evident intent of the legislature was to encourage certain kinds of business by allowing persons to procure certain personal property necessary to the business, by giving a mortgage lien upon the property itself; and money advanced for the express and special purpose of procuring such property is as much within both the spirit and letter of the law as a debt incurred immediately to the seller. If Howard had gone through the form of buying the furniture from the sellers and selling it

again to Butterfield and Baker, there could have been no question about the validity of the mortgage; but surely the law does not require such a vain thing to be done when it so clearly appears that the advance of the money and the purchase of the furniture were, substantially, one transaction. No other state has a statute similar to the one here under review; but one or two authorities have been cited where, with respect to property exempt from execution, "purchase-money" has been given a meaning similar to that contended for by appellant. We think, however, that the case at bar should be governed by the principle applied in *Lassen v. Vance*, 8 Cal. 271, 68 Am. Dec. 322, which was a contest between a homestead claimant and one holding a mortgage for the money which he had advanced for the purchase of the land. In that case the court say: "The money of the plaintiff paid for the lot, and it would be an exceedingly harsh rule of law that would defeat his mortgage upon the very property purchased with the money furnished by himself." It is true that the court said that the deed and the mortgage were "simultaneous acts"; but the same was, practically, the case with the purchase of the furniture in the case at bar.

Judgment affirmed.

Hearing in Bank denied.

CHATTEL MORTGAGE — MORTGAGE GIVEN TO SECURE PURCHASE-MONEY.

— A sale, though absolute in form, which may be avoided by the payment of a certain sum of money at a given time is a chattel mortgage: *Stephens v. Sherrod*, 6 Tex. 294; 55 Am. Dec. 776, and note; *Dabney v. Green*, 4 Hen. & M. 181; 4 Am. Dec. 503. For the distinction between a mortgage and a conditional sale, see *Slowey v. McMurray*, 27 Mo. 113; 72 Am. Dec. 251, and note. For the distinction between a chattel mortgage to secure purchase-money and a pledge, see *Lucketts v. Townsend*, 3 Tex. 119; 49 Am. Dec. 723, and note.

ETCHEPARE v. AGUIRRE.

[91 CALIFORNIA, 288.]

JURY TRIAL — FORM OF VERDICT IN ACTIONS OF CLAIM AND DELIVERY. —

A verdict stating that the jury find for the defendant and fix the value of the property at fifteen hundred dollars is sufficient to support a judgment in favor of the defendant for the return of the property to him, or for the value thereof in case the delivery cannot be had.

JUDGMENT. FORM OF, IN ACTIONS OF CLAIM AND DELIVERY. — A judgment that the defendant recover of the plaintiff a sum of money, or the return of the property described in the complaint and his costs, is not authorized by the Code of Civil Procedure of California, which declares that

such judgment shall be "for the return of the property, or the value thereof in case the return cannot be had."

SALE OF CHATTELS — CHANGE OF POSSESSION. — While it is possible for a vendee of chattels to employ the vendor and yet make such a change of possession as will support a sale, yet if the vendor is left in entire charge of the property which he has sold, or so apparently in charge that there is no visible change in its possession, and nothing to indicate that any change has taken place in the title or possession, then there is no such actual change of possession as is required by law.

SALE OF CHATTELS — CHANGE OF POSSESSION. — The fact that chattels are so situated that the vendee is entitled to and can lawfully take possession at his pleasure is not equivalent to the actual change of possession required by the statute.

SALES. — **EVIDENCE OF WHAT A VENDOR DID AND SAID AFTER A SALE** of chattels is admissible against his vendee, if it is pertinent to the issue whether or not the sale had been accompanied by an immediate delivery and followed by an actual and continued change of possession.

M. V. Biscailuz and W. I. Foley, for the appellant.

W. T. Williams, for the respondent.

VANCLIEF, C. Action to recover the possession of personal property, or the value thereof, commonly called "claim and delivery of personal property."

The defendant, as sheriff of Los Angeles County, seized the property in question by virtue of a writ of attachment as the property of the defendant in the attachment suit, from whom the plaintiff claims to have purchased it before the levy of the attachment. It is alleged in the answer of the defendant that the sale of the property to plaintiff was fraudulent and void as to the creditors of the defendant in attachment, and this was the principal issue tried. The property was delivered to the plaintiff pursuant to section 514 of the Code of Civil Procedure, as a return thereof to the defendant was not required.

The trial was by jury, whose verdict was as follows: "We, the jury in the above-entitled action, find for the defendant, and fix the value of the property at fifteen hundred dollars."

Whereupon it was adjudged by the court "that said defendant have and recover from said M. Etchepare, the plaintiff herein, the sum of fifteen hundred dollars, or the return of the property described in the complaint herein, and his costs."

The plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

1. It is claimed by appellant that the verdict is defective in that it does not find "for the return of the property," and

is not "in the alternative," since the answer of the defendant demands a return of the property.

The verdict for the defendant was special as to the value of the property, as required by the code. As to all other issues, it was general. This was sufficient to justify a judgment for the return of the property, or for the value thereof in case a delivery could not be had. Such a judgment would have consisted entirely of pure conclusions of law from the verdict. The code does not require the verdict to be special, except as to the value of the property, and the sole object of this exception is to enable the court to render an alternative judgment as required by section 667 of the Code of Civil Procedure: *Waldman v. Broder*, 10 Cal. 379; *Hunt v. Robinson*, 11 Cal. 262; *Pico v. Pico*, 56 Cal. 453.

2. But the judgment was not, in form or substance, in accordance with section 667 of the Code of Civil Procedure. The defendant was not entitled to judgment for the value of the property, except upon the condition that a return of the possession thereof could not be had. The judgment should be "for a return of the property, or the value thereof in case a return cannot be had": *Washburn v. Huntington*, 78 Cal. 577.

3. At the request of the plaintiff, the court gave to the jury the following three instructions:—

1. "If you believe from the evidence that the plaintiff purchased the property in question in good faith and for a valuable consideration, and without any design to hinder, delay, or defraud any creditor of Jaureguy, and that the sale was complete and accompanied by an immediate delivery, followed by an actual and continued change of possession, then you must find a verdict for the plaintiff in this action."

2. "A *bona fide* sale of property by a judgment debtor to a person other than the judgment creditor, in payment or satisfaction of a prior debt to such vendee, is not fraudulent because such vendee may be aware at the time of such *bona fide* sale that it will have the effect of defeating the collection of other debts against his vendor."

3. "In determining whether there was an actual and continued change of possession of the property in question at the time of the alleged sale by Jaureguy to the plaintiff, while you are to consider the fact that the plaintiff employed Jaureguy after the alleged sale to plaintiff, still you are not bound, independent of other evidence, to regard this fact alone as conclusive of the question."

But the court refused to give the fourth instruction asked by plaintiff, which is as follows:—

“What constitutes a delivery depends upon the character of the property sold and the circumstances of each particular case. For the purpose of a delivery, it is not necessary that the property sold should pass into the actual possession of the buyer. When property is so situated that the buyer is entitled to and can rightfully take possession of it at his pleasure, he is considered as having actually received it as the statute requires.”

After the court had concluded its instructions, a juror asked the following questions:—

“Can a party who purchases stock or any kind of goods keep in their employ the same parties that were there, and still be complying with the law? or is it necessary to move those goods or move?”

In answer to these questions, the court said: “I will read the instruction asked by plaintiff, but I will do it so that the jury can fully understand with regard to it”; then, after reading the third instruction, given at request of the plaintiff, added to it the following: “A party can employ the person, — the person from whom they purchase; but if they leave the person in the entire charge of the property, or leave them in such apparently entire charge of the property that it appears to the world around about that there has been no change of possession, that there is no open and apparent change of possession, no open and apparent means by which people about can take notice that there has been any change, then there is not such an actual change of possession as is required by law.”

It is contended for appellant that the court erred in refusing the fourth instruction asked by plaintiff, and in giving the addition to the third instruction given at request of plaintiff.

It is true that the language of the fourth instruction requested by plaintiff was extracted from the opinion of Mr. Justice McKee in *Williams v. Lerch*, 56 Cal. 334, but the language extracted is only a part of what was said by Mr. Justice McKee in connection with the facts of that case, which were materially different from the facts in this case. In that case, the property (horses) were in the care and custody of a third person (Drew) for the sole purpose of being pastured on a mountain range at a considerable distance from the residence

of the owner (Sotcher). After executing a bill of sale of the horses to Williams (plaintiff in that action), Sotcher ordered Drew to collect them together and deliver them to Williams. Accordingly, Drew collected the horses, and informed Williams that they were ready for him. Thereupon Williams employed Drew to continue to pasture the horses for him (Williams). Some five months thereafter, while the horses were still being pastured by Drew, they were taken by a constable by virtue of an execution against Sotcher.

Upon these facts, Mr. Justice McKee, immediately preceding the language of the requested fourth instruction, said: "Everything was done which was necessary to a sale. It was complete and perfect, if Drew subsequently delivered the horses to plaintiff, or took charge of them for the plaintiff"; and after the language of the requested instruction, further said: "By delivering the bill of sale to the plaintiff, and giving direction to his agent to get the horses together, and keep them for the plaintiff, to whom they had been sold, Sotcher transferred them to the plaintiff; and when the agent, in obedience to the direction which he had received, collected them together in his pasture for the plaintiff, and wrote to him that they were ready for him, and to come and take them, and the plaintiff employed the agent to take charge of them and winter them for him, this was an actual delivery of the property, so far as the nature and condition of the property admitted of it; and when the agent under his employment turned the horses out to pasture on their accustomed range and kept them exclusively for the plaintiff until they were taken by the defendant, the requisitions of section 3440 of the Civil Code were fully satisfied."

In the case at bar, the cattle alleged to have been sold consisted largely of milch cows, and were in the actual possession of the seller (Jaureguy), who was milking the cows and peddling the milk, with the assistance of two servants. After the alleged sale, he continued to milk the cows and to peddle the milk precisely as before; and the evidence strongly tends to show that he bought the feed for the cattle, and managed and controlled the business and the servants up to the time of the attachment, just as he had done before the alleged sale. Under this state of facts, the fourth instruction requested by plaintiff was not properly applicable, even conceding that it is good abstract law, which seems, at least, doubtful. The language of the instruction asked could not have been in-

tended by Mr. Justice McKee to be read by itself as abstract law, but concretely with its context and the facts of the case of *Williams v. Lerch*, 56 Cal. 334.

The instructions given at the request of the plaintiff, with the explanation added by the court, were quite as favorable to the plaintiff as he was entitled to ask. The oral explanation given by the court in answer to the question of a juror is not so precise and explicit as doubtless it would have been had it been deliberately written; but as given, I think it is, substantially, supported by the following cases: *Stevens v. Irwin*, 15 Cal. 503; 76 Am. Dec. 500; *Malone v. Plato*, 22 Cal. 103; *Cahoon v. Marshall*, 25 Cal. 201; *Bell v. McClellan*, 67 Cal. 283.

4. It is contended that the court erred in permitting Jaureguy to be cross-examined by defendant as to what he did and said in regard to the cattle after he executed the bill of sale of them to the plaintiff. But the testimony objected to was pertinent to the issue as to whether or not the sale had been accompanied by an immediate delivery and followed by an actual and continued change of possession; and therefore the court did not err in admitting it.

I think the order denying a new trial should be affirmed, but that the judgment should be reversed, and that the court below should be directed to enter a judgment on the verdict in favor of the defendant, in substantial accordance with this opinion.

BELCHER, C., and FITZGERALD, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the order denying a new trial is affirmed; but the court below is directed to set aside its judgment entered in said cause, and to enter judgment upon the verdict therein in favor of the defendant, in substantial accordance with the foregoing opinion.

SALES — DELIVERY OF POSSESSION — SUFFICIENCY OF. — Where a vendee of personal property employs the vendor as a laborer thereon, it is a question of fact for the jury as to whether or not there has been a sufficient delivery: *Renninger v. Spatz*, 128 Pa. St. 524; 15 Am. St. Rep. 692, and note. A sale of a horse and wagon under an arrangement between the purchaser and the seller, that the former should have the care and use of them until such time as the latter should be ready to remove them, is fraudulent and void as to subsequent creditors of the seller: *Stevens v. Gifford*, 137 Pa. St. 219; 21 Am. St. Rep. 868, and note. In a sale of chattels, the purchaser must take such open, notorious, and unequivocal possession of the goods as to apprise

every one accustomed to deal with the seller of the sale: *Herr v. Denver etc. Co.*, 13 Col. 406. Transfers of personal property are "conclusively presumed to be fraudulent, when they are not accompanied by an actual and continued possession of the things transferred": *Claudius v. Aguirre*, 89 Cal. 501. Where, in a sale of horses, the horses are to be kept by the seller as security for the balance due on them, such transaction is to be deemed a chattel mortgage, and not a sale: *Kendrick v. Beard*, 81 Mich. 182.

REPLEVIN — JUDGMENT — WHAT MAY BE HAD FOR. — In replevin, the judgment may be for the value of the property, or if that is waived, for the return of the property itself: *Thompson v. Scheid*, 39 Minn. 102; 12 Am. St. Rep. 619, and note. An alternative judgment in replevin does not give the defendant the right of election, either to restore the property or pay the value thereof: *Swanz v. Pillow*, 50 Ark. 300; 7 Am. St. Rep. 98, and note. A judgment for the plaintiff in an action of replevin must be for the possession, or the value thereof in case delivery cannot be had: *Washburn v. Huntington*, 78 Cal. 543; *Cook v. Aguirre*, 86 Cal. 479; *Burke v. Koch*, 75 Cal. 356; *Van Meter v. Barnett*, 119 Ind. 35; *Lang v. Dougherty*, 74 Tex. 227.

BARRETT v. SOUTHERN PACIFIC COMPANY.

[91 CALIFORNIA, 296.]

NEGLIGENCE. — IT IS THE DUTY OF EVERY PERSON TO SO USE AND ENJOY HIS PROPERTY AS TO INTERFERE WITH THE COMFORT AND SAFETY OF OTHERS as little as possible, consistent with its proper use; and a failure to observe this duty in respect to those who have the right to invoke its protection is negligence.

NEGLIGENCE, IN A LEGAL SENSE, is no more than the failure to observe, for the protection of another person, that degree of care, precaution, and vigilance which the circumstances demand, whereby such other person suffers injury.

NEGLIGENCE. — A CHILD OF IMMATURE YEARS HAS CAPACITY TO EXERCISE ONLY SUCH CARE AND SELF-RESTRAINT as belongs to childhood, and a reasonable man must be presumed to know this, and required to govern his actions accordingly.

NEGLIGENCE — CHILDREN. — TO LEAVE UNGUARDED, AND EXPOSED TO THE OBSERVATION OF LITTLE CHILDREN, dangerous and attractive machinery, which they naturally would be tempted to go about and upon, and against the dangers of which their immature judgment opposes no warning or defense, is an act of negligence.

NEGLIGENCE IN LEAVING A TURN-TABLE UNGUARDED. — If a turn-table, provided with a latch and slot such as are in common use, is not protected by any inclosure, nor left in the charge of any person whose duty it is to guard it, and a child of eight years of age goes upon it to ride while it is being turned by older children, and is caught and seriously injured, it is for the jury to determine whether the owner of the turn-table is guilty of negligence, and answerable to the child for the injuries suffered.

NEGLIGENCE — TURN-TABLES. — The liability of one who has left a turn-table unguarded and unprotected, for injuries suffered by a child of immature years, is not affected by the fact that the turn-table was set in motion by the negligence of older children.

CONTRIBUTORY NEGLIGENCE OF PARENT. — Where a child of immature years has suffered injuries from an unguarded turn-table, and it is claimed that the negligence of his mother in not properly watching over and caring for him contributed to his injuries, it is not error to charge the jury "that they may consider the evidence as to her condition and circumstances in determining the question as to her negligence."

ACTION to recover for injuries claimed to have been suffered from defendant's negligence in leaving one of its turn-tables unprotected and unguarded. On the day when the accident occurred, the plaintiff had been told to wait for his mother at a grocery-store on the corner of the street opposite to the turn-table. Prior to that day he had, on several occasions, been sent by his widowed mother to gather coal around and near the turn-table. The only criticism of the second instruction made by counsel for appellant in their brief was, that it "would naturally lead the jury to understand that the degree of care required of the mother and child was to be measured by her poverty and his peculiar characteristics." This instruction was on the subject of the alleged contributory negligence of the plaintiff's mother, and was, in substance, "that, for sustaining such defense, they must find a want of ordinary care on her part as a parent, in respect to the cause of the injury; that her failure to use more than ordinary care in providing for the safety of her child would not defeat the action; that the burden of proof of her negligence was upon the defendant; that they might consider the evidence as to her condition and circumstances in determining the question as to her negligence; and that if she did not know, or have reason to know, or anticipate or fear, the danger of the turn-table, she was not negligent in not providing against it."

John D. Bicknell and W. C. Belcher, for the appellant.

Victor Montgomery, and Holloway and Kendrick, for the respondent.

DE HAVEN, J. This is an action to recover damages for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. The plaintiff recovered a judgment for eight thousand five hundred dollars, and from this judgment, and an order denying its motion for a new trial, the defendant appeals.

It was shown upon the trial that defendant maintained a railroad turn-table upon its own premises in the town of Santa Ana. This table was about 150 yards from defendant's depot,

and near its engine-house, and distant seventy-two feet from a public street. It was provided with a latch and slot, such as is in common use on such tables, to keep it from revolving, but it was not protected by any inclosure, nor did the defendant employ any person whose special duty it was to guard it. There were several families with small children residing within a quarter of a mile from the place of its location, and previous to the time when plaintiff was hurt, children had frequently played around and upon it, but when observed by the servants of defendant were never permitted to do so. At the date of plaintiff's injury he was eight years of age, and on that day he, with his younger brother, saw other boys playing with the turn-table, and, giving them some oranges for the privilege of a ride, got upon it, and while it was being revolved, his leg was caught between the table and the rail upon the head-blocks, and so severely injured that it had to be amputated. The defendant moved for a nonsuit, which motion was denied. This ruling of the court, and certain instructions given to the jury, present the questions which arise upon this appeal.

The appellant contends that it was not guilty of negligence in thus maintaining upon its own premises for necessary use in conducting its business the turn-table in question, and which was fastened in the usual and customary manner of fastening such tables; that the plaintiff was wrongfully upon its premises, and therefore a trespasser, to whom the defendant did not owe the duty of protection from the injury received; and that the court should have so declared, and nonsuited the plaintiff.

This view seems to be fully sustained by the case of *Frost v. Eastern R. R. Co.*, 64 N. H. 220; 10 Am. St. Rep. 396. But, in our judgment, the rule, as broadly announced and applied in that case, cannot be maintained without a departure from well-settled principles. It is a maxim of the law that one must so use and enjoy his property as to interfere with the comfort and safety of others as little as possible, consistently with its proper use. This rule, which only imposes a just restriction upon the owner of property, seems not to have been given due consideration in the case referred to. But this principle as a standard of conduct is of universal application, and the failure to observe it is, in respect to those who have a right to invoke its protection, a breach of duty, and, in a legal sense, constitutes negligence. Whether, in any given

case, there has been such negligence upon the part of the owner of property, in the maintenance thereon of dangerous machinery, is a question of fact dependent upon the situation of the property and the attendant circumstances, because upon such facts will depend the degree of care which prudence would suggest as reasonably necessary to guard others against injury therefrom; "for negligence, in a legal sense, is no more than this: the failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury": Cooley on Torts, 630. The question of defendant's negligence in this case was a matter to be decided by the jury, in view of all the evidence, and with reference to this general principle as to the duty of the defendant. If defendant ought reasonably to have anticipated that leaving this turn-table unguarded and exposed, an injury such as plaintiff suffered was likely to occur, then it must be held to have anticipated it, and was guilty of negligence in thus maintaining it in its exposed position. It is no answer to this to say that the child was a trespasser, and if it had not intermeddled with defendant's property it would not have been hurt, and that the law imposes no duty upon the defendant to make its premises a safe playing-ground for children.

In the forum of law, as well as of common sense, a child of immature years is expected to exercise only such care and self-restraint as belongs to childhood, and a reasonable man must be presumed to know this, and required to govern his actions accordingly. It is a matter of common experience that children of tender years are guided in their actions by childish instincts, and are lacking in that discretion which is ordinarily sufficient to enable those of more mature years to appreciate and avoid danger, and in proportion to this lack of judgment on their part, the care which must be observed toward them by others is increased. And it has been held in numerous cases to be an act of negligence to leave unguarded, and exposed to the observation of little children, dangerous and attractive machinery, which they would naturally be tempted to go about or upon, and against the danger of which action their immature judgment opposes no warning or defense.

The following are some of the cases in which this has been held: *Railroad Co. v. Stout*, 17 Wall. 657; *Hydraulic Works*

v. *Orr*, 83 Pa. St. 335; *Powers v. Harlow*, 53 Mich. 507; 51 Am. Rep. 154; *Nagel v. Missouri Pac. R'y Co.*, 75 Mo. 653; 42 Am. Rep. 418; *Koons v. St. Louis etc. R. R. Co.*, 65 Mo. 592; *Kansas Cent. R'y Co. v. Fitzsimmons*, 22 Kan. 686; 2 Am. Rep. 203; *O'Malley v. St. Paul etc. R'y Co.*, 43 Minn. 289; *Whirley v. Whitman*, 1 Head, 610. These cases, we think, lay down the true rule.

The fact that the turn-table was latched in the way such tables are usually fastened, or according to the usual custom of other railroads, although a matter which the jury had a right to consider in passing upon the question whether defendant exercised ordinary care in the way it maintained the table, was not, of itself, conclusive proof of the fact: *Stout v. Sioux etc. R. R. Co.*, 2 Dill. 294; *O'Malley v. St. Paul etc. R'y Co.*, 43 Minn. 289.

Nor is the liability of the defendant affected by the fact that the table was set in motion by the negligent act of other boys. This is so held in some of the cases above cited, and the same principle was announced by this court in *Pastene v. Adams*, 49 Cal. 87, in which case it was held that a person who had negligently piled lumber, which had remained in that condition for a long time, was not exempt from damages sustained by one on whom it fell, because the lumber was made to fall by the negligence of a stranger.

We see no error in the second instruction given at request of plaintiff. The portion to which exception was taken is not very well expressed, but we think, taken as a whole, the instruction states the law correctly.

Judgment and order affirmed.

NEGLIGENCE. — Negligence exists from a failure to observe the due care in the use of one's property according to the circumstances, to prevent injury to others who have the right to expect such care: *Caniff v. Blanchard Nav. Co.*, 66 Mich. 638; 11 Am. St. Rep. 541, and note; *Morris v. Brown*, 111 N. Y. 318; 7 Am. St. Rep. 751, and note; *Larkin v. O'Neill*, 119 N. Y. 221; *Lancaster v. Connecticut etc. Ins. Co.*, 92 Mo. 460; *Ellis v. Lake Shore etc. R. R. Co.*, 138 Pa. St. 506.

NEGLIGENCE — CARE REQUIRED IN DEALING WITH CHILDREN. — Greater care is required in dealing with children of tender years than with persons of discretion: *Penso v. McCormick*, 125 Ind. 116; 21 Am. St. Rep. 211, and note; *Swift v. Staten Island etc. R. R. Co.*, 123 N. Y. 645; *Western etc. R. R. Co. v. Young*, 83 Ga. 512.

RAILROADS — UNFASTENED TURN-TABLE — QUESTION FOR JURY AS TO NEGLIGENCE. — Whether or not a railroad company is negligent in leaving its turn-table unfastened, thereby injuring a child of tender years, is a question for the jury: *Ihwaco R'y etc. Co. v. Hedrick*, 1 Wash. 446; 22 Am. St.

Rep. 169, and note. See note to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 595. See *Haesley v. Winona etc. R. R. Co.*, 46 Minn. 233; 24 Am. St. Rep. 220, and note. An opinion manifestly in conflict with that in the principal case may be found in *Bates v. Railway Co.*, 90 Tenn. 36; *post*.

[IN BANK.]

SMITH v. PHOENIX INSURANCE COMPANY.

[91 CALIFORNIA, 323.]

INSURANCE. — CONDITION IN A POLICY OF INSURANCE EXEMPTING THE INSURER FROM LIABILITY IF ANY CHANGE TAKES PLACE IN THE TITLE OR POSSESSION is not violated by a lease of the property and a taking possession by a tenant, when the application for insurance states that the property is to be occupied by a tenant for hotel purposes, and the insurer had full knowledge, before issuing the policy, of the purpose for which the building was being constructed, and that it was to be occupied by a tenant. No particular tenant being named in the application, the issuing of the policy was a consent to the occupancy of any tenant whom the assured should select.

VENDOR AND PURCHASER. — THE EQUITABLE TITLE AS BETWEEN THE VENDOR AND VENDEE, upon the execution of a valid contract for the sale and purchase of land, is, for most purposes, regarded as being in the latter.

VENDOR AND PURCHASER — LOSS FROM DESTRUCTION OF PROPERTY, ON WHOM MUST FALL. — If a lease is made containing an agreement that the lessor will sell and the lessee will buy the leased property at the expiration of the lease, and a material part of it, before the termination of the lease, is destroyed by fire, the obligation of the lessee to purchase ends with such destruction.

INSURANCE. — A CONDITION IN A POLICY OF INSURANCE AGAINST ANY CHANGE IN THE TITLE OR POSSESSION of property is not broken by an agreement between its lessor and lessee that the former will sell and the latter will buy the property at the expiration of the lease.

VENDOR AND PURCHASER. — INSURANCE COLLECTED BY A VENDOR ON A POLICY OF INSURANCE is held in trust for his vendee, and must be applied to the payment of the unpaid purchase-money.

Haggin, Van Ness, and Dibble, for the appellant.

Barclay, Wilson, and Carpenter, for the respondents.

BEATTY, C. J. In March, 1890, we made a decision in this case, reversing the judgment of the superior court, with directions to enter judgment on the findings in favor of the appellant. After a rehearing of the case, and upon fuller consideration of the questions involved, we are satisfied that our former decision was erroneous, and that the judgment of the superior court should be affirmed.

The action is upon a fire insurance policy. Plaintiffs had

judgment in the lower court, and defendant appealed from the judgment alone, claiming that, upon the facts found, the judgment should have been in its favor.

The policy in suit was issued in August, 1887, and the property insured consisted of a frame building designed for a hotel or boarding-house. The defendant was advised by the papers accompanying the application for insurance—which, by the terms of the policy, are made a part of the contract—that the building was occupied, or to be occupied, by a tenant (no particular tenant being named) for hotel purposes, and it is found by the court, as alleged in the complaint, “that before said insurance was effected, defendant had full knowledge that said building was built by plaintiffs for the purpose of renting the same for a boarding and lodging house, and was to be occupied by the tenant of the plaintiffs, the said building not being at that time fully completed and furnished.”

After the insurance was effected and the building completed, the plaintiffs, on December 24, 1887, by a written lease demised the insured premises to one J. D. Stewart for a term of five years, at a fixed rent, payable monthly. The lease also contained stipulations binding the plaintiffs to put in certain furniture, consisting of carpets, cooking-range, gas-fixtures, etc., and binding Stewart to put in other necessary furniture. It was agreed that the building and furniture should be properly insured for the benefit of the parties, as their interest might appear, and that Stewart, the lessee, should pay one half of the expense of insuring the building and the entire expense of insuring the furniture.

It was further agreed as follows: “Said party of the second part [Stewart] may at any time during said term of five years purchase said hotel, lots, and premises for the sum of twenty-five thousand dollars cash, and likewise purchase said carpets, gas-fixtures, and range at cost price. It is further agreed that said party of the second part will purchase said hotel, lots, and premises on or before five years from this date for the sum of twenty-five thousand dollars, together with said carpets, gas-fixtures, and range at their cost price.”

The defendant had no notice of these stipulations for purchase and sale of the property. Under this lease and agreement, Stewart entered into possession of the insured premises, and so continued until the destruction of the hotel by fire, in April, 1888.

The plaintiffs thereafter, upon due notice and proofs of loss, demanded payment of the policy, which was refused by the defendant. Hence this action, which is defended on the ground of an alleged violation by plaintiffs of the following conditions of the policy: "*If the property be sold or transferred (in whole or in part), or upon the commencement of foreclosure proceedings against, or a sale under a deed of trust, or the existence of a judgment lien, or the issue or levy of an execution against, any kind of property herein described; or if the property be assigned under any bankrupt or insolvent law, or any change takes place in the title or possession (except in case of succession by reason of the death of the assured), whether by legal process or judicial decree, or voluntary transfer, assignment, or conveyance; or if the title or possession shall be changed from any cause whatsoever; or if this policy shall be assigned before a loss, without the consent of the company indorsed hereon,—this policy shall in each and every instance be void.*"

The passages which we have Italicized are those to which attention is particularly directed, the claim of appellant being that the lease and agreement of sale, and Stewart's possession thereunder, wrought a change both in the title and possession of the property insured, involving a forfeiture by plaintiffs of all rights under the policy.

In their argument at the rehearing, counsel for appellant took the position, for the first time, that possession by Stewart, under the lease and as a tenant merely, without regard to the contract of sale, was a violation of the provision of the policy against a change of possession. But clearly this position cannot be maintained, in view of the statement made in the application upon which the policy was issued, to the effect that the building was to be occupied by a tenant for hotel purposes, and the fact found by the court that defendant had full knowledge, before issuing the policy, of the purpose for which the building was being constructed, and that it was to be occupied by a tenant: Occupancy of the identical character contemplated by the policy was not a change of possession. The issuance of the policy was an express consent to possession by a tenant, and since no particular tenant was named, it was a consent to occupancy by any tenant selected by the assured, subject, of course, to revocation by canceling the policy and returning the premium if an objectionable tenant was selected.

The real and only question in the case is, whether the con-

tract of sale embraced in the lease, or superadded to it, wrought a change in the title to the insured premises within the meaning of the policy, or imparted to the possession of Stewart a character materially different from the possession of a tenant. Upon this question we held in our former decision, in accordance with the contention of appellant, that Stewart, by taking possession of the insured premises under the lease and agreement of December 24, 1887, not only acquired the right, but became absolutely bound to complete the purchase; that henceforth the buildings were at his risk; that if they were destroyed the loss would be his alone, because he was obliged, at the expiration of his term as tenant, upon tender of a deed for the land without the buildings, to pay the full contract price of twenty-five thousand dollars. From this it necessarily followed that Stewart, from the time of taking possession, acquired an insurable interest equivalent to the value of the buildings, and that if plaintiffs could collect the insurance and keep it, they would be paid twice over for the buildings, so that they would have a direct interest in their destruction. Of course, upon these premises it was impossible to avoid the conclusion that the effect of the transaction with Stewart was to work a change in the title, not merely nominal and technical, but substantial and material to the risk, and necessarily violative of the conditions of the policy.

But on a fuller consideration of the case, we are satisfied that the authorities cited in our opinion and in the briefs of counsel did not warrant us in holding that, under the circumstances of this case, Stewart, by taking possession under the lease and contract of December 24, 1887, became absolutely bound to complete the purchase of the premises at the expiration of his term, notwithstanding the previous destruction of the buildings.

There can be no question that, under such a contract, the equitable title to the land, as between the vendor and vendee, is in the latter. This is a familiar doctrine of equity, based upon the principle that, for the prevention of fraud and the enforcement of the just rights of the parties, equity will deem that to be done which ought to be done. The maxim is applied most frequently in actions by the vendee for specific performance of the contract, or in aid of his defense when the vendor is seeking to recover possession of the land upon his legal title: *Laffan v. Naglee*, 9 Cal. 663; 70 Am. Dec. 678; *De Rutte v. Muldrow*, 16 Cal. 505; *Hall v. Center*, 40 Cal. 63;

Dowd v. Clarke, 54 Cal. 48; *King v. Ruckman*, 21 N. J. Eq. 599.

Decisions almost innumerable to the same effect might be cited from the reports of this and other states, but they do not decide the question involved in this case.

There is a wide distinction between the proposition that the vendee in possession under an executory contract of sale may maintain the possession against the vendor as long as he performs his part of the agreement, and upon full compliance may enforce specific performance of the vendor's contract to convey the legal title, and the proposition here contended for, viz., that the vendor in such a contract, notwithstanding the destruction of the subject of the contract, in whole or in part, before the date stipulated for payment and conveyance, and his consequent inability to make a conveyance of that for which the vendee has bargained, may nevertheless compel the vendee to pay the whole contract price in exchange for a fraction of the property sold.

When we come to make a critical examination of the cases cited to this point, and especially the cases in which the precise question we are considering is directly involved, we find that they lend a very slight support to the appellant's contention.

In the case of *McKetchine v. Sterling*, 48 Barb. 330, the doctrine is, it is true, carried to an extreme degree; but the authorities cited in support of that decision are not in point, and the reasoning by which they are made to support the decision is very unsatisfactory.

In *Richter v. Selin*, 8 Serg. & R. 439, the supreme court of Pennsylvania use this language: "Where a contract is made for the sale of land, equity considers the vendee as the owner of the estate sold, and the purchaser as a trustee for the vendor for the purchase-money. So much is the vendee considered, in contemplation of equity, as actually seised of the estate, that he must bear any loss that may happen to the estate between the agreement and the conveyance, and he will be entitled to any benefit which may accrue to it in the interval, because by the contract he is the owner of the premises to every intent and purpose in equity." But this was said *arguendo*, in deciding a case where the point was not directly involved, and the proposition, true enough in general and in its application to the circumstances of that case, was stated in its most unqualified form, and without regard

to the special circumstances which in many cases render it inapplicable.

Similar statements of the same doctrine are to be found in some of the insurance cases hereinafter referred to, with reference to most of which it was correctly applied, as we shall see.

But we shall also see that the doctrine has its reasonable limitations, and that this is one of the cases to which it cannot be applied without doing the wrong and injustice which it was designed to prevent.

In the case of *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65, the facts were, that the plaintiff agreed to sell the defendant a farm, and the defendant agreed to buy. On the day previous to that fixed for the payment and conveyance, the buildings on the farm were destroyed by fire. The plaintiff tendered a conveyance in pursuance of the contract, and demanded payment of the purchase price, which being refused, he sued for damages. It was held that he could not recover, because by reason of the destruction of the buildings he was unable to comply with the contract on his part. It is true, the vendee had not taken possession, and the court found it necessary to distinguish the cases in which lessees in possession had been held liable on their covenant to pay rent or make repairs notwithstanding the destruction of tenements by fire during the term. In those cases it was said the liability of the defendant resulted from the fact that the lessors had fully complied with their contracts, while in the case under consideration the plaintiff was unable to do so.

There can be no doubt of the soundness of this distinction, and no difficulty, we think, in showing that it applies to the present case.

In the earlier Massachusetts case (*Thompson v. Gould*, 20 Pick. 134) it was applied, where the defendant was in possession, and had paid the purchase price for the purpose of sustaining his right to recover back the money paid.

In that case the agreement of purchase and sale was by parol, but the plaintiff paid at different dates the whole purchase price, and got receipts in writing specifying the purpose of the payments, and he had entered into possession of the house. Clearly, under the circumstances, he had put himself in a position to enforce specific performance of the contract to convey, and was the owner of the equitable title. But before any conveyance was tendered, the house was destroyed

by fire, and the plaintiff sued in *assumpsit* for the money paid. In a well-considered opinion, the court held that he was entitled to recover back the money on account of failure of consideration.

It was conceded that the contract of the vendor, though by parol, could, under the circumstances, have been specifically enforced, but it was denied that it could have been enforced against the vendee after destruction of the house.

It may be said that in this decision the mere legal rights of the parties were regarded, and that the court could not act upon the equitable doctrine for want of jurisdiction; but it will be seen that the equitable doctrine was discussed in the opinion, and its reasonable limitations pointed out.

What those limitations are it is not necessary that we should consider exhaustively. For the purpose of this decision, it is sufficient to say that no case has been cited, and we have discovered none, in which the vendee has been held bound to pay the purchase price, where a valuable part of the property has been destroyed before the day fixed for payment and conveyance, unless he has taken possession under the contract of sale, or has the right to such possession under the contract before the occurrence of the loss.

Now, in this case, it is to be remembered that the agreement between plaintiffs and Stewart consisted of a lease for a term of five years, reserving a rent, payable monthly in money, a stipulation giving Stewart the privilege of purchasing at twenty-five thousand dollars at any time during the term, and the contract binding him to purchase at twenty-five thousand dollars at the end of the term.

In considering the question before us, we may lay out of view the stipulation giving Stewart the privilege of purchasing, for clearly he was not thereby bound to take the property and pay for it, even if it remained whole and intact. To determine the character of his possession with reference to the extent of his liability upon his agreement to purchase, the contract is to be viewed as if it consisted merely of the lease and the agreement to purchase. Would Stewart, entering under such a contract at the beginning of the term demised, be deemed, for the purpose of enforcing a most inequitable liability, to have entered and to be holding under his contract of purchase? Clearly he would not, if his possession could be referred to either the lease or the contract as distinct from the other; for there can be no doubt that during the term of

the lease he would hold under that. His right to remain in possession would depend on his payment of rent and performance of other covenants of the lease, and would be determined by failure so to pay and perform.

And we think that, for the purpose of determining his liability under his agreement to purchase, in case of destruction of a material part of the property sold prior to the time for payment and conveyance, this distinction between the lease and agreement ought to be made. It is reasonable and equitable, and not opposed to any authority cited, unless the case in 48 Barbour, above referred to, should be deemed an authority against it. If so, we can only say that we think that case goes to an unreasonable length, and that it ought not to be followed. On the contrary, we think the best-considered cases warrant us in holding that the liability of Stewart upon his agreement to purchase ended with the destruction of the hotel; that it was never at his risk, but was always at the sole risk of the plaintiffs.

But appellant contends that even on this view there was a change of title and possession within the meaning of the policy, and he cites a number of cases to sustain the proposition that the equitable ownership of a vendee under a contract of purchase constitutes a sole, absolute, and unconditional ownership, and consequently that the vendor cannot also be the sole, absolute, and unconditional owner. A review of these cases, however, will show that they differ essentially from the case in hand.

In the case of *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581, the legal title to the property insured was in a trustee, who held it as security for about sixteen hundred dollars, subject to which encumbrance the plaintiff and two others owned the equitable title in equal shares. The plaintiff bought out his co-owners, agreeing to pay each the sum of one thousand dollars for his interest, and he had paid on his purchase five hundred dollars to one and seven hundred dollars to the other. He had also taken possession of the land, and erected a dwelling thereon at a cost of two thousand seven hundred dollars, and was to receive a conveyance from the trustee upon the payment of the sum secured to him on the property. Under these circumstances, the court held that it was not a misrepresentation on the part of plaintiff in applying for insurance to state that the property was his. And it was also held that his interest in the property was, within the

meaning of the policy, an absolute interest, because he could by no contingency be deprived of it except by his own consent. No doubt this case was correctly decided.

The plaintiff, by reason of his original interest in the property, his payment to his co-owners upon the purchase of their interests, and the money he had expended in improvements on the property, independent of his agreement to purchase, had bound himself to do so, and he was the only person who could suffer loss by destruction of the property. It was his, therefore, absolutely, in every sense of the word material to the risk. And the decision was in line with hundreds of others in which the courts everywhere have refused to defeat recovery upon insurance policies by giving effect to the literal terms of clauses of forfeitures. Such clauses are always, and justly, construed with the utmost strictness against the insurer, and always with reference to their only legitimate object; i. e., the protection of the insurer against risks that are materially different from those which he has undertaken. The cases of *Millville Mut. Fire Ins. Co. v. Wilgus*, 88 Pa. St. 110, *Chandler v. Commerce Fire Ins. Co.*, 88 Pa. St. 223, *East Texas Fire Ins. Co. v. Dyches*, 56 Tex. 565, *Swift v. Vermont Mut. Ins. Co.*, 18 Vt. 313, and *Gaylord v. Lamar Fire Ins. Co.*, 40 Mo. 16, 93 Am. Dec. 289, are all substantially like the Connecticut case, and the decisions rest upon the same ground. In every instance the vendee had made large or complete payments upon his purchase, or valuable improvements, or both. In other words, he had given bonds to complete it, so that the loss must necessarily fall upon him in case of destruction of buildings.

The case of *Davidson v. Hawkeye Ins. Co.*, 71 Iowa, 532, 60 Am. Rep. 818, upon the authority of which, principally, our former decision herein was based, was another of the same sort. There the vendee had entered into possession of a small farm under a contract to purchase it for four hundred dollars, upon which fifty dollars was to be paid in cash. Prior to the sale, the vendor had, as in this case, procured insurance on a building on the farm. After the sale, the building was destroyed by fire, and the vendor sued on the policy. The defense was breach of a condition of the policy against any sale or conveyance of the property by the insured. The defense was sustained on the ground that there was a sale of the property. This ruling was clearly opposed to the decision of the supreme court of Maryland in *Washington Ins. Co. v.*

Kelly, 32 Md. 421, 3 Am. Rep. 149, and to other decisions cited in the dissenting opinion.

It was rested also upon the false assumption that if the plaintiff could collect the insurance he could also collect the full purchase price of the building from his vendee, which would be holding, in effect, that the defendant remained bound by the policy after it became the interest of the assured to destroy the property.

But upon the doctrine of equity that the vendee in possession is the equitable owner of the property, and the vendor merely his trustee of the legal title; the money collected by the plaintiff on the policy would have been held in trust for the vendee, and applied on the purchase price: *Reed v. Lukens*, 44 Pa. St. 202; 84 Am. Dec. 425; so that in fact the plaintiff, even if he had been held entitled to recover on the policy, could have no interest in the destruction of the property. And so in this case, even if Stewart could be held bound by his contract of purchase after the fire, the plaintiff could gain nothing by collecting the amount of the policy. This, however, would be no answer to the objection of defendant that the title was changed in a sense material to the risk; for to hold that the plaintiff could collect the insurance for the benefit of his vendee would convert the transaction into a virtual assignment of the policy, which can never be done without the consent of the insurer.

We do not, therefore, rest our decision in any degree upon the ground that the plaintiffs could not possibly have derived an advantage from the destruction of the hotel, and have only alluded to the matter for the purpose of calling attention to the false quantity in the reasoning of the Iowa supreme court in the case cited in support of our former decision.

The cases of *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. St. 460, 2 Am. St. Rep. 686, and *Elliott v. Ashland Mutual Fire Ins. Co.*, 117 Pa. St. 548, 2 Am. St. Rep. 703, cited on the rehearing, are essentially like the other cases cited to the same point, which we have already considered.

We conclude that there was in this case no change of title or possession material to the risk, and that the judgment of the superior court on the facts found was correct.

In reaching this conclusion, we have not overlooked the argument based upon the fact that Stewart agreed to pay one half of the premium on the insurance of the hotel. That

agreement is evidently one of the terms of the lease, as contradistinguished from the agreement to purchase.

The judgment is affirmed.

Rehearing denied.

INSURANCE — CONDITION AGAINST ALIENATION. — A condition in a policy of insurance that a transfer of title will render the policy void relates only to conveyances by which the interest of the insured is absolutely and permanently divested: *Power v. Ocean Ins. Co.*, 19 La. 28; 36 Am. Dec. 665, and note. An executory contract for a sale does not violate this rule: *Washington etc. Ins. Co. v. Kelly*, 32 Md. 421; 3 Am. Rep. 149; nor a mortgage: *Washington Ins. Co. v. Hayes*, 17 Ohio St. 432; 93 Am. Dec. 628, and note; *Dwelling House Ins. Co. v. Hoffman*, 125 Pa. St. 626; *Continental Ins. Co. v. Vanlue*, 126 Ind. 410; nor a nominal transfer as collateral security: *Ayres v. Hartford etc. Ins. Co.*, 17 Iowa, 176; 85 Am. Dec. 553, and note; nor possession of a sheriff under an execution: *Phoenix Ins. Co. v. Lawrence*, 4 Met. 9; 81 Am. Dec. 521, and note. A conveyance of property by the assured for the purpose of indemnifying against loss one who had become his surety in a criminal prosecution will not avoid the policy: *Bryan v. Traders' Ins. Co.*, 145 Mass. 389; nor will any transfer of the property which leaves an insurable interest in the insured: *Jerdee v. Cottage Grove etc. Ins. Co.*, 75 Wis. 345. A transfer to the heirs at law, by operation of law, upon the death of the insured, does not avoid the policy: *Pfister v. Gerwig*, 122 Ind. 567.

VENDOR AND PURCHASER — CONTRACT OF SALE — EQUITABLE TITLE. — A purchaser of land under an agreement, who has paid the purchase-money and gone into possession, has only an equitable interest in the premises: *Jackson v. Morse*, 16 Johns. 197; 8 Am. Dec. 306. A contract for the sale of land made for a valuable consideration vests the equitable interest in the vendee: *Hampson v. Edelen*, 2 Har. & J. 64; 3 Am. Dec. 530, and note; *Robertson v. Read*, 52 Ark. 381.

[IN BANK.]

PACIFIC RAILWAY COMPANY v. WADE.

[91 CALIFORNIA, 449.]

FRANCHISE GRANTED TO A STREET-RAILWAY CORPORATION GIVES IT NO EXCLUSIVE USE of that portion of the street upon which its road is constructed, but only the right to construct such road in such place and manner as not to interfere with the use of the street by the public.

EMINENT DOMAIN — PROCEEDINGS BY, WHEN NOT NECESSARY. — If a general statute provides that two lines of street-railways, operated under different managements, may be permitted to use the same street by paying an equal portion for the construction of the track and appliances used by such railways jointly, but that in no case shall two lines, operated under different managements, occupy or use the same street and track for a distance of more than five blocks consecutively, every street-railway corporation constructing a railway under authority of such statute consents that its track may be used jointly with any other railway which the municipality may authorize to use it for the distance of five

blocks, and hence cannot insist that such occupancy is a taking of private property for a public use, which can be authorized only under a statute relating to the exercise of the right of eminent domain.

RECEIVER OF A CORPORATION MAY, WITH THE PERMISSION OF THE COURT, DO ANYTHING which the corporation might lawfully have done to make the most out of its assets.

RECEIVER OF CORPORATION — AMOUNT TO BE PAID TO OR BY, HOW MAY BE FIXED — JURY TRIAL. — When there is a claim for damages or compensation in favor of a corporation whose property is in the hands of a receiver, it may be adjusted upon a petition to the court in which the receiver is acting, which may proceed to determine the issues involved in the petition without the aid of a jury.

WHEN A STREET-RAILWAY CORPORATION IS IN CUSTODY OF THE COURT THROUGH ITS RECEIVER, and another like corporation has a right to use a portion of the former on paying an equal portion for the construction of the track and appliances, such court may, on petition, fix the amount to be paid by the petitioning corporation to acquire the right to use such track.

Houghton, Silent, and Campbell, and S. C. Hubbell, for the petitioner.

John D. Pope, Chapman and Hendrick, Dorn and Dorn, W. S. Goodfellow, and S. C. Denson, for the respondent.

PATERSON, J. The Pacific Railway Company is the owner of a street-railroad operated by means of a wire cable for the carriage of persons in the city of Los Angeles. On January 20, 1891, Edward W. Russell commenced an action against said company, its stockholders, and a large number of creditors, alleging, among other matters, that he was a judgment creditor; that the company was indebted in large sums to divers persons, without means or revenue to pay the same, except by the operation of its railroad system, and the proceeds thereof were wholly insufficient; that suits had been brought, and many attachments suits would follow, unless steps be taken to prevent the same, and the operation of the road would be suspended; that to protect all parties a receiver was necessary. Wherefore plaintiff prayed for the appointment of a receiver to take charge of and control the property of said company, and if necessary, to sell the same for the payment of the debts. On the day the complaint was filed, J. F. Crank was appointed receiver, with directions to take charge of the street-railways owned by and under the control of the Pacific Railway Company, together with all its real and personal property, and to manage and conduct the business thereof, and, from time to time, render his accounts. Crank qualified and took possession, and has ever since con-

tinued to operate the road under the order of the court. On January 26, 1891, the Los Angeles Consolidated Electric Railway Company presented to the superior court a petition in said cause, setting forth that the petitioner had entered upon the construction of its line of road, as authorized by certain ordinances, and in the further prosecution of its work it was necessary that it should intersect the tracks of the Pacific Railway Company and run along the same for a distance of three blocks, and praying an order authorizing it to operate over and on said tracks for said distance, and directing the receiver to grant all necessary facilities therefor, and for a further order fixing the amount of compensation which petitioner should pay for the right to use the tracks as aforesaid. At the time fixed for hearing, the petitioners herein appeared, and objected to any proceedings being taken, on the ground that the court had no authority to grant the relief asked. The court overruled the objection, and decided that it had jurisdiction to determine the amount of damages which would be occasioned by making the connections referred to in the petition, and continued the matter for hearing to July 16, 1891. Thereupon petitioners applied to this court for an alternative writ of prohibition, which was granted. In response to the order to show cause why he should not be restrained from any further proceedings in said matter, the judge filed an answer admitting the facts stated, and alleging that the order appointing the receiver was made on motion of the plaintiff in the action, and with the consent of the defendants therein; that on February 13, 1891, the plaintiff Russell filed a petition, setting forth that there was some doubt whether the order appointing the receiver was sufficient of itself to vest in him the title to the property, especially the real property, so as to enable him to exercise all the powers and perform all the duties which the exigencies of the case might require, and asking for an order directing the Pacific Railway Company to assign its property to the receiver; that the order was made as prayed for, with the consent of the Pacific Railway Company.

Section 499 of the Civil Code provides that "two lines of street-railway, operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the track and appurtenances used by said railways jointly; but in no case must two lines of street-railway, operated under different managements, occupy and

use the same street or tracks for a distance of more than five blocks consecutively."

The petitioner contends that as the ordinances granting the franchises do not provide how compensation shall be ascertained, the electric company must proceed under the provisions of subdivision 6 of section 465, Civil Code. That section is a part of the chapter on the enumeration of the powers of every railroad corporation, and provides that "every corporation whose railroad is, or shall be hereafter, intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections, and grant facilities therefor; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or the manner of such crossings, intersections, and connections, the same shall be ascertained and determined as is provided in title 7, part 3, Code of Civil Procedure." But title 7, part 3, prescribes rules for the assessment of compensation and damages (Code Civ. Proc., sec. 1248) inconsistent with the measure of compensation established by section 499 of the Civil Code, and the latter must control, as it relates particularly to street-railroads. What counsel for the petitioner means to claim, doubtless, is, that the procedure prescribed by title 7 must be followed; that there must be an effort to agree with the cable company as to the amount to be paid, and upon disagreement, an action against the receiver in the manner and form required by the title on eminent domain, including a trial by jury, if the defendant insist upon it.

The question to be determined is, simply, whether the court, which, through its receiver, has the custody and control of the insolvent corporation's property, has the power to determine the compensation, viz., one half of the cost of the construction of the tracks and appurtenances used by the companies jointly, or whether the electric company must treat with the cable company, and upon failure to agree as to the amount to be paid, bring an action therefor against the receiver with the permission of the court.

None of the elements of an ordinary condemnation proceeding is involved in the litigation; there is no private property to be taken for public use, — no occasion to exercise the right of eminent domain. The cable company did not acquire by the grant of its franchise any proprietary interest in the street. There can be no private property in a street, except the fee of

the owner, which is held subject to the easement as long as the public continue to use the street as a highway. "The maintenance of horse-railroads and running of cars upon the public streets of the city of San Francisco, designed for the carriage of passengers, is a mere special mode of using the highway, nothing more. The right to maintain such a railroad does not exclude the public from the use of the street." (*Market Street R. R. Co. v. Central R'y Co.*, 51 Cal. 586.) The franchise of the cable company gave it no exclusive use of that portion of the street upon which its road was constructed. It gave to the company the right to construct its road in such a place and manner as not to interfere with the use of the street by the public. The material placed in the street, it is true, is still the property of the cable company; but it was placed where it is with full knowledge on the part of the company that the latter would have no exclusive right to its use so long as it should remain in the street. The right of the public to drive vehicles over and upon its road, and the right of the mayor and council to grant to another street-car company a franchise to connect with its track, and to use the same for a distance not exceeding five blocks, entered into its contract with the city as fully, under the provisions of section 499 of the Civil Code then in force, as if the condition had been expressly stated in the grant; and as the cable company took its franchise with the understanding—in effect an express stipulation—that any other company authorized by the mayor and counsel might use the track jointly with itself, it cannot now be heard to say that such a taking is without its consent, and is a taking of private property for public use, which can be done only by proceedings under the statute relating to eminent domain. The grant to the cable company was made to facilitate, not to abridge, the public use of the street; and the subsequent franchise having been granted to the electric company in accordance with the provisions of the statute, it cannot be said to be a taking of the property of the cable company for any higher or different purpose than that to which it had already been devoted: *Civ. Code*, secs. 497–499; *Omnibus R. R. Co. v. Baldwin*, 57 Cal. 178; *Jersey City etc. R. R. Co. v. Jersey City etc. R. R. Co.*, 21 N. J. Eq. 556; *Kinsman St. R. R. Co. v. Broadway etc. R. R. Co.*, 36 Ohio St. 239; *Sixth Avenue R'y Co. v. Kerr*, 45 Barb. 138; *People v. Kerr*, 37 Barb. 357; *Chicago etc. R. R. Co. v. Dunbar*, 100 Ill. 138;

St. Louis etc. R. R. Co. v. Southern R'y Co., Mo., March, 1891;
St. Louis etc. R. R. Co. v. Southern R'y Co., 105 Mo. 577.

If it be true that the grant of the franchise to the electric company gave to it an absolute right, under the statute (Civ. Code, sec. 499), to use the tracks of the cable company upon payment of one half of the cost of construction of the tracks and appurtenances used jointly by the companies, and that there is no question as to the right of eminent domain involved in the matter before us, the question whether the respondent has the right to fix the amount of damages or compensation to be paid by the electric company is a simple one. The property of the cable company is *in custodia legis*. The receiver is indifferent between the parties. His possession is the possession of the court, for the benefit of all persons interested, whether named as parties in the action or not, and it cannot be disturbed without the consent of the court. No one claiming a right paramount to that of the receiver can assert it in any action without the permission of the court. No sale can take place, no debt can be paid, no contract can be made, which does not receive the sanction of the court. The receiver, with permission of the court, can do anything the corporation might have done to make the most out of the assets in his hands; it has been held that in a proper case he may settle disputed claims, and compromise with debtors of the corporation; he may lease other lines of railways, and operate them; he may complete the construction of unfinished lines of railroad, and negotiate loans for the payment of the cost thereof; he may enter into contracts by the terms of which the owners of other roads may use the road under his control at given rates; and he may change the rates agreed upon prior to his appointment, between the company he represents and another railroad corporation: Code Civ. Proc., sec. 568; Beach on Receivers, secs. 268, 335, 360, 406; Gluck and Becker on Receivers, 106, 107, 131, 140, 241; *In re New Jersey etc. R'y Co.*, 29 N. J. Eq. 67; *Wiswall v. Sampson*, 14 How. 65; *Gibert v. Washington etc. R. R. Co.*, 33 Gratt. 586.

In the case before us, the electric company has the right, under the statute and its franchise, to use the tracks of the cable company upon payment of one half of the cost of the construction thereof. The only question to be determined is, What is the amount due the cable company? It is like any other claim for damages or compensation in favor of a corporation whose property is in the hands of a receiver, and is to be

determined in the same way. As to the manner of determining such question, there has been some discordance of opinion among judges, but so far as we have investigated the subject, there has been no conflict of decision; the cases all hold that while it is, under certain circumstances, proper to direct the prosecution of an action at law against the receiver to determine the amount of compensation or damages to be paid, the better and more commonly recognized practice is to apply for relief by petition to the court in which the receiver is acting. The rule applies to all cases of damages to person or property, whether occasioned prior or subsequent to the appointment of the receiver: *In re Merrill*, 54 Vt. 200; *Redfield on Railways*, 6th ed., 378, 380; *High on Receivers*, secs. 139, 255, 256; *Mills on Eminent Domain*, sec. 75; *Olyphant v. St. Louis O. & S. Co.*, 28 Fed. Rep. 729; *Central Trust Co. v. Wabash etc. R'y Co.*, 28 Fed. Rep. 871. Any party deeming himself aggrieved by the judgment of the court has the right of appeal: *First Nat. Bank v. Barnum Wire Works*, 58 Mich. 315; *Porter v. Kingman*, 126 Mass. 141.

It is claimed by petitioner that this view of the case deprives it of the right to have the question of compensation determined by a jury, — a right which is guaranteed to it by the constitution (art. 1., sec. 14); but as it is not a case involving the exercise of the right of eminent domain, is not a taking of private property for public use, the contention is without merit. In *Barton v. Barbour*, 104 U. S. 126, the court, speaking to a similar objection, said: "The argument is much pressed, that by leaving all questions relating to the liability of receivers in the hands of the court appointing them, persons having claims against the insolvent corporation or the receiver will be deprived of a trial by jury. This, it is said, is depriving the party of a constitutional right. . . . But those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity. . . . The new and changed condition of things which is presented by the insolvency of such a corporation as a railroad company has rendered necessary the exercise of large and modified forms of control over its property by the courts

charged with the settlement of its affairs and the disposition of its assets." See also *Joy v. City of St. Louis*, 138 U. S. 1.

It is unnecessary, in view of what has been said, to consider the questions raised by respondent, — whether prohibition is the proper remedy, and whether the petitioner is competent to invoke it.

The question as to whether the East and West Los Angeles Railroad Company sold or leased its tracks on Washington Street to the petitioner is a matter to be considered by the superior court on the hearing of the petition, and is not the subject of inquiry in this proceeding: *Bishop v. Superior Court*, 87 Cal. 233. The respondent declares in his answer filed herein that "neither the said court nor the judge thereof ruled or intimated that he had any power to fix the compensation or authorize the connection with any railway tracks not belonging to the Pacific Railway Company, or any property not in the custody and control of the court."

The application is denied, and the alternative writ is discharged.

Rehearing denied.

STREET-RAILWAYS — RIGHTS IN STREETS. — A street-railway corporation accepts its charter on the implied condition that it will not injure others by the construction or maintenance of its road: *Alton etc. R'y Co. v. Deitz*, 50 Ill. 210; 99 Am. Dec. 509. Streets are for the use and benefit of all persons, and consequently no one can have any exclusive rights or privileges therein: *Theobald v. Louisville etc. R'y Co.*, 66 Miss. 279; 14 Am. St. Rep. 564. Railway companies authorized to construct their tracks in the public streets must respect the rights of others who are entitled to make use of the streets as public highways: *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286; 12 Am. St. Rep. 644, and note; *Fulton v. Short Route etc. Co.*, 85 Ky. 640; 7 Am. St. Rep. 619; *Sheehy v. Kansas City C. R'y Co.*, 94 Mo. 574; 4 Am. St. Rep. 396; *Mahady v. Bushwick R. R. Co.*, 91 N. Y. 148; 43 Am. Rep. 661.

RECEIVERS — AGENTS OF THE COURT — AUTHORITY. — Receivers are agents of the courts appointing them, and must obey the orders and act under the instructions of such courts: *Brown v. Warner*, 78 Tex. 543; 22 Am. St. Rep. 67, and note; *Allspaugh v. Adams*, 80 Ga. 345; in dealing with the estate, and disposing of the assets of the debtor: *Brush v. Jay*, 113 N. Y. 482; *Willis v. Sharp*, 124 N. Y. 406. A receiver may be considered in some sense as representing the insolvent debtor or corporation: *Howe v. Harding*, 76 Tex. 17; 18 Am. St. Rep. 17, and note; *McKinnon v. Wolfenden*, 78 Wis. 237. As the agent of the court, a receiver represents all the parties interested in the property coming into his hands as such receiver: *New Haven Wire Co. Cases*, 57 Conn. 352; *First Nat. Bank v. Barnum etc. Works*, 60 Mich. 487. A receiver has no greater powers than the corporation upon whose property he is appointed to administer: *Wisconsin etc. Ins. Co. v. Manistee etc. Co.*, 77 Mich. 76; *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150.

WORLEY v. NETHERCOTT.

[91 CALIFORNIA, 512.]

VENDOR AND PURCHASER — IMPERFECT TITLE. — If, after a contract is made for the sale of real property, it is ascertained that the title of the vendor is not perfect, the vendee must either rescind the contract and restore possession, or accept the title as it is and pay the purchase price. He cannot, while declining to pay such price on account of the defect in the title, hold possession of the property until the title shall be perfected.

John F. Ellison and W. P. Johnson, for the appellant.

William Nagle, for the respondent.

BELCHER, C. In January, 1889, the plaintiff was residing upon and claiming to own certain real property in the town of Red Bluff, Tehama County. On the 26th of that month, plaintiff verbally agreed to sell the real property and some personal property to the defendant for the sum of \$1,880, and to let him take immediate possession thereof. Plaintiff was to give a warranty deed of the real property, conveying a good and perfect title thereto, and defendant was to pay \$1,000 cash, and give his note for \$880, bearing interest at the rate of ten per cent per annum, but it was not stated how long the note might run. Defendant paid ten dollars to bind the bargain, and asked plaintiff if he had a good title to the property, and the latter replied that he thought he had; that he had a warranty deed of it. Defendant asked for an abstract of the title, and plaintiff agreed to furnish one. On the 29th of the month defendant took possession, and about that time the abstract was made out and put in the hands of Mr. Ellison, an attorney at law. On the 4th of February the parties met, and went to Mr. Ellison's office, and defendant testified: "When I entered Mr. Ellison's office, knowing that he had the abstract, I said to him: 'As an attorney, can you say that the title is perfect?' He said: 'No, I can't.' He said: 'I have looked over it, and I can't say that it is perfect.'" A few days later, the parties again met, and plaintiff testified: "I went to him and told him I was going away, and I wanted to settle it up one way or another; he wanted to know what I wanted to do, and I asked him if he was satisfied with the title, and he said he was n't; then I told him we would say quits; he said he had been out considerable in moving down there, and would be in moving away; I asked him how much, and he said about twenty dollars; I told him I would pay it and he would give up possession; he said he did n't care to

do it." Defendant then proposed to retain possession of the property and to make some improvements upon it, and plaintiff agreed that he might make improvements costing from \$100 to \$150.

Before the end of February, plaintiff went to the mountains, and he did not return till some time in August. During his absence, defendant made improvements on the property, costing, as he testified, \$388.21 besides his own work, which he estimated to be worth \$125.

The matter remaining unsettled, plaintiff, in October, executed a warranty deed of the property, and on the 2d of November tendered it to the defendant, and demanded of him payment of the balance of the purchase-money, namely, \$1,870. The defendant refused to accept the deed or to pay the money, but he, on the same day, tendered and asked plaintiff to execute a warranty deed for an undivided one half of the property, and in connection therewith offered to pay him \$1,075 for the real and personal property. The plaintiff refused to execute this deed or to accept the payment as offered.

The plaintiff then served on defendant a notice reading as follows:—

"MR. ROBERT NETHERCOTT.

"*Dear Sir,* — Having refused to pay me the contract price for the land hereinafter described, I hereby notify you that the contract of sale for said lots is hereby rescinded. I hereby offer to pay you for any improvements you have made upon said property, the amount they have cost you, upon being satisfied of the true amount, and also the ten dollars you paid thereon, with legal interest, deducting therefrom the rent of said premises during the time you have occupied them; and I hereby demand that you leave said premises, and surrender up to me the possession thereof. [Then follows a description of the property.]

[Signed]

"W. H. WORLEY."

Possession was not surrendered, and the plaintiff brought this action of ejectment to recover the same. The defendant answered, denying all the averments of the complaint, and for a second defense setting up the contract of sale and plaintiff's failure and inability to convey a good and perfect title, and his own readiness and ability to perform his part of the contract on receiving a conveyance of such title.

The court below gave judgment for the defendant, from which, and from an order denying him a new trial, the plaintiff appeals.

It appears from the evidence that the plaintiff did not have a perfect title to the whole of the property which he agreed to sell; and it is claimed for respondent that under such circumstances he was not obliged to accept plaintiff's deed or to pay the purchase-money, but that he could retain both the land and money until a perfect title should be offered him.

We do not think this position can be maintained. In *Gates v. McLean*, 70 Cal. 42, the action was brought to recover the possession of certain land which the plaintiff had contracted to sell to the defendant, and the court, on page 50, said: "Even where the contract provides for the vendee taking possession, the remedy of the purchaser, where the title of the vendor fails, or he is unable to make conveyance as stipulated in the contract, is to rescind the contract, or offer to, and to restore the possession, in which case he may recover the purchase-money advanced and the interest, together with the value of his improvements, deducting therefrom such sum as the use of the premises may reasonably have been worth. If, on the other hand, the purchaser chooses not to rescind, but to retain possession under the contract, he can do so only on the condition that he pays the purchase-money and interest according to the contract. In the latter case, it is considered that he is willing to receive such title as the vendor is able to give, and is content with the personal responsibility of the vendor upon his covenants."

In *Rhorer v. Bila*, 83 Cal. 54, the court said: "A purchaser cannot remain in possession of lands under a contract and at the same time refuse to pay the purchase price. If the title fails, or the vendor refuses to convey, an action on the covenants of his deed or contract will give him all the relief to which he is entitled."

It is urged for respondent that what is said in the above quotation from *Gates v. McLean*, 70 Cal. 42, was not necessary to the decision of that case, and was merely *obiter dictum*; and that it was not a correct statement of the law, and ought not to be followed.

We cannot assent to the conclusion reached by counsel. In our opinion, the law was correctly declared, whether what was said was necessary to the decision of that case or not. To hold otherwise would, in many cases, work very great injustice.

It follows, in our opinion, that the findings and judgment were erroneous, and that they ought not to be permitted to stand.

We advise, therefore, that the judgment and order be reversed, and the cause remanded for a new trial.

FITZGERALD, C., and VANCLIEF, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded for a new trial.

Hearing in Bank denied.

VENDOR AND PURCHASER — REMEDY OF VENDEE — DEFECT IN TITLE. — If, after a contract of sale has been made, the vendee ascertains that the vendor's title is imperfect, he may either rescind the contract and recover the money paid by him thereunder, or he may, when sued for the purchase-money, recoup damages for a failure to obtain a perfect title: *Tyson v. Eyrick*, 141 Pa. St. 296; 23 Am. St. Rep. 287; *Burks v. Davies*, 85 Cal. 110; 20 Am. St. Rep. 213; *Wright v. Dickinson*, 67 Mich. 580; 11 Am. St. Rep. 602, and note; *Turner v. McDonald*, 76 Cal. 177; 9 Am. St. Rep. 189.

[IN BANK.]

RUTLEDGE v. CRAWFORD.

[91 CALIFORNIA, 526.]

ELECTIONS. — A BALLOT SHOULD NOT BE REJECTED because there is on its back a faint type-impression of a portion of the face of a similar ticket, produced, when there is too much ink upon the type used in printing, by placing one ticket face downward upon the back of another which preceded it from the press, if there is no evidence tending to show that the ticket was marked in this manner for the purpose of distinguishing it from other ballots.

ELECTIONS — BALLOTS, MARKS ON BACK OF. — Under a statute declaring that "when a ballot found in any ballot-box bears upon the outside thereof any impression, device, color, or thing, or is folded in a manner to distinguish such ballot from other legal ballots found therein, it must be rejected," a ballot should not be rejected because there is on the outside of it a stain, piece of wax, or any other mark apparently placed there by accident, if there is nothing in the evidence to indicate that it was on the ballot for the purpose of distinguishing it from other ballots, or to impart knowledge of the person who voted it.

ELECTIONS. — A BALLOT IS TO BE CONSTRUED AS ANY OTHER WRITING, and while a resort to parol evidence of extrinsic circumstances may be had for the purpose of interpreting what would otherwise be doubtful, it cannot be shown by such, or any, evidence that the intention of the voter was anything different from what plainly appears on the face of the ballot.

ELECTIONS — BALLOTS. — WRITING A CANDIDATE'S NAME OPPOSITE AN OFFICE FOR WHICH HE IS NOT A CANDIDATE, as where, when one is a candidate for judge, the name of the candidate for state senator is erased and that of the candidate for judge written in its place, does not entitle the latter to have the ballot count for him for judge.

ELECTIONS. — A VOTE FOR A PERSON FOR AN OFFICE FOR WHICH HE IS NOT A CANDIDATE may result either from mistake or from a frivolous exercise of the right of suffrage. Hence a vote cannot be counted as cast for him for the office for which he is a candidate.

ELECTIONS — BALLOTS — INDELIBLE PENCIL — RED INK. — A ballot on which a printed name was erased, and another name written with an indelible pencil or with red ink, should be counted for the person whose name is thus written, though the statute provides that "when upon a ballot found in the ballot-box a name has been erased and another substituted therefor in any other manner than by the use of a lead-pencil or common writing-ink, the substituted name must be rejected, and that erased, if it can be ascertained from inspection of the ballot, must be counted."

STATUTES, HOW SHOULD BE INTERPRETED. — Every statute should be construed, not according to the letter, but according to the meaning. The intention must govern, although such construction may not, in all respects, agree with the letter of the statute.

ELECTIONS — CONSTITUTIONAL LAW. — Statute requiring that when a name of a candidate is erased from a ballot it must still be counted for him, unless the name of another person is substituted for it, or the words "no vote" are written opposite the erasure, is not unconstitutional, as prescribing an educational qualification for the voter, or requiring him to disclose the secrecy of his ballot.

ELECTION CONTEST. — THOUGH THE STATEMENT FILED TO CONTEST AN ELECTION DOES NOT SHOW THAT THE CONTESTANT POSSESSES THE QUALIFICATIONS required to make him eligible to the office contested, still, if it shows him to be an elector, and, as such, authorized to contest the election, he is entitled to a judgment annulling the election of the respondent.

A. B. Ware and T. J. Geary, for the appellant.

C. S. Farquar and J. A. Barham, for the respondent.

DE HAVEN, J. The parties to this action were opposing candidates for the office of judge of the superior court of Sonoma County, at the general election of 1890. The respondent, Crawford, received a certificate of election, and this is an action contesting his right thereto.

As a result of the trial and recount in the superior court, it appearing that the defendant received one vote more than the plaintiff, the court, on motion of defendant, granted a non-suit and dismissed the proceedings.

The plaintiff appeals from this judgment, and claims that the court erred in counting certain ballots for the respondent, and in refusing to count others for himself.

1. Two ballots, regular on their face, and with the appellant's name printed thereon for judge of the superior court, were not counted by the court, for the reason that there was on the back of each a faint type-impression of a portion of the face of a similar ticket. The impression is known among printers as an "offset," and is produced, when there is too much ink upon the type used in printing, by placing one ticket face downward upon the back of another which has preceded it from the press. In our opinion, the court erred in its refusal to count these ballots for appellant.

Section 1206 of the Political Code provides: "When a ballot found in any ballot-box bears upon the outside thereof any impression, device, color, or thing, or is folded in a manner designed to distinguish such ballot from other legal ballots deposited therein, it must, with all its contents, be rejected."

Prior to the adoption of the code, it was the usual practice to have the tickets of the different political parties of a different color, or weight, or size, so that an observer at the polls could see at a glance and detect the party ticket that was deposited by the voter. It was to prevent this, and secure to the citizen absolute secrecy for his ballot, that the section above quoted and others of the same code were enacted, prescribing for ballots uniformity of paper, color, and size, and in order to justify the rejection of a ballot under this section it must appear that such "impression, device, color, or thing" on the outside thereof was intended to distinguish it from other legal ballots: *Wyman v. Lemon*, 51 Cal. 273; and the court is not authorized to find such design when it is just as reasonable to attribute the appearance of the ticket to accident as design. It is not doubted, as was argued here, that tickets may be marked in this way for the purpose of distinguishing them from other ballots, and to be furnished only to a certain class of voters. But, in the absence of any proof tending to show this, the presumption must be, that such an impression was the result of accident, and not intended, and therefore within neither the letter nor spirit of this section, or section 1207 of the same code, which provides that when a ballot bears upon it any impression, device, color, or thing intended to designate or impart knowledge of the person who voted it, it must be rejected.

2. What is said in the preceding paragraph will apply with equal force to the two ballots not counted for appellant, one of which had upon its back a very small piece of red sealing-

wax, and the other a small stain as if made by a drop of oil, or something of that nature. It is far more reasonable to suppose that the wax was accidentally placed upon the ticket by the officers of election in sealing the package in which it was returned, than to believe that it was designedly placed there as a distinguishing mark before its deposit in the ballot-box; and as to the other, the mark or discoloration is of that character that the most natural conclusion in relation to it is, that it was due to some accidental cause, and was not intended to distinguish the ballot, or impart knowledge of the person who voted it.

3. The court erred in counting ballot marked exhibit 37 as a vote for respondent; the ticket, so far as necessary to be set out, is as follows:—

“18. Judge of the Superior Court, Thomas Rutledge.

“19. Judge of the Superior Court, J. W. Oates.

“20. State Senator, Tenth District, Robert Howe,”—with the name “Robert Howe” erased, and that of the respondent written opposite, or in line with it.

We do not see how this ticket can be read as a vote for respondent for the office of judge of the superior court. A ballot is to be construed as any other writing, and while a resort to parol evidence of extrinsic circumstances may be had for the purpose of interpreting what would otherwise be doubtful, it cannot be shown by such, or any, evidence that the intention of the voter was anything different from what plainly appears upon the face of the ballot: *People v. Seaman*, 5 Denio, 409. And when the ballot intelligently shows that a particular person is voted for to fill a particular office, it cannot be counted differently because the court may believe that the voter made a mistake in preparing his ticket. Voting for a person to fill an office for which he is not a candidate may be the result of mistake, or it may be merely the frivolous exercise of the right of suffrage; but no matter whether such action be attributed to folly or mistake, the ballot is the only expression of the voter's will, and it must be counted according to its legal effect. The intention of the voter, as it appears upon the face of this ballot, was to vote for respondent for state senator, and not for judge of the superior court, and it should be so counted.

4. Upon certain ballots the printed name of the respondent was erased with an indelible pencil, and the name of the appellant written opposite thereto with the same kind of pencil.

The court refused to count the same for appellant, but did count such ballots as votes for respondent. The respondent insists that the rulings of the court in relation to the counting of these ballots are justified by section 1204 of the Political Code. That section declares: "When upon a ballot found in any ballot-box a name has been erased and another substituted therefor in any other manner than by the use of a lead-pencil or common writing-ink, the substituted name must be rejected, and the name erased, if it can be ascertained from an inspection of the ballot, must be counted."

There was evidence introduced tending to show that indelible pencils are not in fact lead-pencils, nor commonly known as such by merchants selling them. The question is thus presented, whether a voter must follow the very letter of this section of the code in preparing his ticket, or have his vote for a particular candidate rejected. We think it very clear that such is not the purpose or the meaning of that section. The code commissioners, in their note to this section, say: "This section is intended to prevent the use of nitrate of silver, or any other chemical substance which may be written over a name, and not be distinguishable until time brings out the impression; also to prevent the use of pasters, the use of which is subject to two objections: 1. Their liability to come off; 2. Their liability to be fraudulently taken off."

This object of the law — and it is apparent that the legislature could have had no other in view — is attained if the erasure and substitution are made in such a manner as to present at the time and retain the same general appearance as if made by a lead-pencil or common writing-ink. This section, when it declares that erasures and change of names shall not be made "in any other manner than by the use of a lead-pencil or common writing-ink," really means that the erasure and substitution shall not be made in any other style or form, or with any different effect, than would be produced by the use of a lead-pencil or common writing-ink. The law looks only to matters of substance, and does not waste its energy in pursuit of shadows, and if the appearance of having been made with a lead-pencil is produced by the use of an indelible pencil, there is a substantial compliance with the statute, although such a pencil may not, strictly speaking, be known as a lead-pencil. Any other construction would sacrifice the spirit and reason of the law to the mere letter; and yet, it is one of the great maxims of interpretation to keep

always in view the general scope, object, and purpose of the law, rather than its mere letter. "He who considers merely the letter of an instrument goes but skin-deep into its meaning": Broom's Legal Maxims, 611.

"A rigid and literal meaning would, in many cases, defeat the very object of the statute, and would exemplify the maxim that 'The letter killeth, while the spirit keepeth alive.' Every statute ought to be expounded, not according to the letter, but according to the meaning. . . . And the intention is to govern, although such construction may not, in all respects, agree with the letter of the statute": *Tracy v. Troy etc. R. R. Co.*, 38 N. Y. 437; 98 Am. Dec. 54.

5. The court erred in counting ballot No. 8 as a vote for the respondent. Upon this ticket the printed name of respondent was erased with red ink, and that of J. W. Oates written in place of it, also in red ink. The respondent contends that red ink is not common ink within the meaning of the statute. We cannot say that it is not such ink, and it is clear that its use is not within the mischief which it is the object of the law to prevent.

6. Upon several ballots the name of appellant was erased and no name substituted therefor, and the words "no vote" were not written after the name erased. These were counted as votes for appellant. The court was correct in this ruling. The statute, in order to guard against fraudulent erasures, has provided this as the only way in which the voter can manifest his intention to erase a name, when he does not substitute another, and under such circumstances the erasure is not complete unless followed by these words. There is no valid constitutional objection to this requirement. It does not prescribe any educational qualification for the voter, nor require him to disclose the secrecy of his ballot, as contended.

7. The statement or complaint filed herein by appellant does not allege that he possesses the qualifications required by the constitution of this state to make him eligible to the office of judge of the superior court, and it is claimed by respondent that the statement is therefore fatally defective, and for that reason the judgment dismissing the proceeding should be affirmed. It is true that, in order to entitle appellant to the full relief asked for, to wit, a judgment that he was elected instead of respondent, the statement should have alleged facts showing that he was eligible. But the statement is not fatally defective if it states a case for any relief (*Perri*

v. *Beaumont*, 91 Cal. 30), and we think that it does. It is alleged that the appellant is an elector of the county of Sonoma, and such being the case, he was authorized to commence this proceeding, and upon proof of the facts alleged in his statement, was entitled to a judgment annulling the election of defendant.

As the case must be remanded for a new trial, the court below should, upon application, permit the appellant to amend his statement so as to allege the necessary facts showing his eligibility to be chosen to the office the election to which is in controversy here: *Perri v. Beaumont*, 91 Cal. 30.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

Rehearing denied.

ELECTIONS — BALLOTS. — As to the sufficiency of ballots, defects and ambiguities therein, the evidence admissible with respect to, and the rules for rejecting or determining for whom they should be counted, see *Gumm v. Hubbard*, 97 Mo. 311; 10 Am. St. Rep. 312, and note 317-322; *Hartman v. Young*, 17 Or. 150; 11 Am. St. Rep. 787, and note 798-800; *Calvert v. Whitmore*, 45 Kan. 99; 23 Am. St. Rep. 718, and note; *Boyer v. Teague*, 106 N. C. 576; 19 Am. St. Rep. 547, and note; *Heyfron v. Mahoney*, 9 Mont. 497; 18 Am. St. Rep. 757, and note; *Brown v. McCollum*, 76 Iowa, 479; 14 Am. St. Rep. 228, and note. In *State v. Barden*, 77 Wis. 601, it was decided that the printing of the word "Judiciary" on the back of ballots was not a violation of the Wisconsin statute which provides that no "printing, engraving, device, or mark of any kind" shall be printed upon the back of ballots, where the election was for judges and other officers, and under the law the ballots were required to be put into separate boxes.

ELECTIONS — COMPLAINT IN ACTIONS OF CONTEST. — As to what the complaint in a contested election case should state, see *Boyer v. Teague*, 106 N. C. 576; 19 Am. St. Rep. 547; *Krietz v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349. Proper ultimate facts must be pleaded in election contests, as in other cases: *Todd v. Stewart*, 14 Col. 286. That the contestor is an elector of the county must be pleaded and proved as a material allegation: *Clanton v. Ryan*, 14 Col. 419. The contestor must, in the statement filed by him, give the names of such persons as he claims illegally voted for his opponent, as well as the names of those whose votes for himself were illegally rejected: *Schwarz v. County Court*, 14 Col. 44; and also the name of the party whom the board of canvassers decided to have been properly elected: *Andrews v. Judge of Probate*, 74 Mich. 278.

LATAILLADE v. ORENA.

[91 CALIFORNIA, 565.]

GUARDIAN AND WARD. — **THE SETTLEMENT OF A GUARDIAN'S ACCOUNTS** by a probate court does not conclude his ward as to property fraudulently withheld from the account. Hence, after such settlement, a bill in equity may be sustained by the ward against his guardian to compel the latter to account for property which he fraudulently withheld from the account, and the existence of which he concealed from the court.

PRACTICE — JOINDER OF CAUSES OF ACTION. — A bill in equity against the former guardian of the complainant, to compel an accounting for moneys received at different times from the sale of different parcels of property, states but a single cause of action.

STATUTE OF LIMITATIONS. — **AN ACTION FOR RELIEF IS, ON THE GROUND OF FRAUD,** within the meaning of the statute of limitations, when it is for an accounting for moneys held and received in trust for the contestant and appropriated to defendant's use, the receipt and existence of which were at all times concealed from the plaintiff.

STATUTE OF LIMITATIONS — FRAUD. — Though a statute provides that a cause of action on the ground of fraud shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud, the party relying on such statute must show that he used due diligence to detect the fraud complained of, and should state when he discovered it, how the discovery was made, and why it was not made sooner.

STATUTE OF LIMITATIONS — FRAUD. — **A COMPLAINANT IS NOT CHARGEABLE WITH WANT OF DILIGENCE IN NOT DISCOVERING THE FRAUD** of his guardian in concealing the receipt and existence of property when such guardian was his step-father, in whose family, and as whose child, he was brought up and in whom he had implicit confidence, and there was no reason for him to suspect that a fraud was being practiced upon him. There being nothing to put him on inquiry, he cannot be presumed to have known anything concerning the fraud, nor not to have used due diligence because he did not suspect and detect it.

PLEADING — FRAUD. — **FRAUD AND AN EXCUSE FOR NOT SOONER DISCOVERING IT ARE SUFFICIENTLY DISCLOSED** by a pleading stating that defendant was the guardian of plaintiff, whose father died the owner of a large number of cattle and of two tracts of land, but that defendant represented that such father had died insolvent; that the defendant sold the cattle and land and received the proceeds and converted them to his own use; that he filed an inventory as guardian, in which he did not show the existence of such property nor the receipt of such proceeds, and in all his accounting as such fraudulently concealed their existence; that defendant was complainant's step-father, as well as his guardian, in whose family complainant was brought up; that he had implicit confidence in his guardian and believed all his statements concerning the property, and did not have any reason to question them until he had left the family of defendant, and was for the first time advised that his father had not died insolvent, but had left such cattle and lands, and that the same had been disposed of by defendant.

COMMUNITY LANDS — SALE OF, BY WIDOW. — If, where the law of community property prevails, real property is purchased with community

assets, and a conveyance thereof taken in the name of the widow, it, upon the death of the husband, vests in the widow and children as tenants in common, and a sale by her does not transfer or otherwise affect the interest of the children, nor give them any right to have an accounting of the proceeds of the sale.

WRONGFUL SALE OF CHATTELS OF A CO-TENANT, AND HIS RIGHT TO AN ACCOUNTING THEREFOR. — If chattels belonging to a mother and children as tenants in common are sold by her second husband, who is also guardian of the children, and the proceeds are by him converted to his own use, such sale is a conversion, but the children may waive the tort and maintain an action against the guardian for an accounting.

R. B. Canfield and John J. Boyce, for the appellant.

Garber, Boalt, and Bishop, for the respondent.

BELCHER, C. The plaintiff commenced this action to obtain an accounting, and the appeal is from a judgment entered against him after demurrer sustained to his third amended complaint.

The facts stated in the complaint are, in substance, as follows: On the twelfth day of April, 1849, Cæsario Lataillade, plaintiff's father, died intestate, in the town of Santa Barbara, where he was residing, leaving a widow and three minor children, of whom plaintiff, who was born December 2, 1849, was one.

After his marriage to plaintiff's mother, the decedent purchased two ranchos situated in what is now the county of Santa Barbara, and paid for them with his own funds; but at his request, the conveyances were executed to his wife as grantee, and were accepted by her for the benefit of her husband, and thereafter the ranchos were owned and possessed as the community property of the two. At the time of his death, the decedent was also the owner of a large number of cattle then grazing upon the ranchos. For several years prior to 1849, defendant had the care and management of the ranchos and cattle as the agent of the decedent, and afterwards, with the consent of plaintiff's mother, he continued to have the same care and management, until the property was sold and disposed of, as hereinafter stated.

In 1854 the defendant married the plaintiff's mother, who is still his wife, and thereafter, during his minority and until July, 1885, plaintiff continuously lived in defendant's family, and was brought up and treated as his own child. In the same year, defendant was duly appointed the guardian of plaintiff's person and estate, and continued to act as such until the latter became of age.

From time to time, after April, 1849, defendant sold all of the said cattle, but for what sum or sums of money plaintiff is not advised; and in 1868 he negotiated a sale of the ranchos for the sum of twenty-seven thousand dollars, or thereabouts, and induced the plaintiff's mother to execute deeds thereof to the purchasers, and to permit him to receive the entire purchase-money. The defendant received all the money paid for the cattle and ranchos, and mingled the same with his own funds, and wrongfully and fraudulently converted the same to his own use, with the intent to deprive plaintiff of his lawful share thereof.

At all the times mentioned, defendant knew that the cattle and ranchos were owned by the plaintiff's father at the time of his death, and that plaintiff became the owner of an interest therein as his heir; but he always concealed this fact from the plaintiff, and wrongfully and fraudulently represented to him that his father died insolvent, and that he had no interest in the cattle or ranchos.

When defendant was appointed guardian of plaintiff, he filed in court an inventory purporting to show all the estate of his ward, but he did not, in that inventory or in any inventory, or otherwise, at any time include any of the aforesaid property; and when he applied for and obtained a final discharge from his trust, he falsely stated in his petition, and represented to the court, that he had returned a full and true inventory of all the estate of plaintiff which had come into his hands as guardian, and paid over and delivered the same to the plaintiff.

This condition of things continued until July, 1885, the plaintiff all the time during his minority, and afterwards, relying implicitly on the statements and representations of defendant concerning plaintiff's property rights and the condition of his father's estate, and having no means of ascertaining the falsity of such statements and representations.

In the last-named month, difficulties and disputes arose between the parties, and the plaintiff then left the household of defendant, and ceased to be a member of his family, or to have friendly or confidential relations with him. "Thereupon this plaintiff, in interviews with persons who had acted in the capacity of servants upon the ranchos belonging to his said father, for the first time ascertained that his father, during his lifetime, had the interests in said real and personal property as particularly hereinabove set forth, and that said

property was in the custody, care, and management of the defendant at the time of the death of his said father; and this plaintiff was then, for the first time, directed to one Augustin Janssens, who carried on business in the said county of Santa Barbara during the married lifetime of the said Cæsario Lataillade, deceased, and at the time of the purchase of the said ranchos, who then, for the first time, showed this plaintiff, by entries in his commercial books regularly kept in his business, wherein his daily transactions were entered at the time they took place, that he had acted as the agent of the said Cæsario Lataillade in respect to the payment of the purchase-money of said ranchos; and plaintiff avers that said account-books and the statements of said Janssens then and there disclosed to this plaintiff that his father was the owner of said ranchos, and that he was the real purchaser thereof and the owner of the said cattle thereon."

Shortly after these discoveries, plaintiff demanded of defendant a full accounting of all his dealings with the property of the deceased Lataillade since his death, and the increase thereof, but defendant refused, and still refuses, to render to plaintiff any such account, or any account whatever, in relation to the said property. The proceeds of the cattle and lands disposed of by defendant, as aforesaid, are still in his hands, and plaintiff is the owner of and entitled to the one-sixth part thereof, together with the increase and profits arising therefrom.

The complaint was filed on the twenty-first day of February, 1887, and the prayer was, that defendant be compelled to account for all his dealings and transactions with the said property, and the proceeds and increase thereof; that he be charged interest on all sums of money received by him from the sales of the property, compounded annually; and that plaintiff have judgment for such amount as he may be found entitled to.

The demurrer was upon the grounds that the court had no jurisdiction of the subject-matter of the action; that several causes of action were improperly united, and not separately stated; that the complaint did not state facts sufficient to constitute a cause of action, for the reason that it appeared on the face thereof that the cause of action was barred by the statute of limitations and by the plaintiff's laches; and that the complaint was ambiguous, unintelligible, and uncertain

in several particulars. It does not appear upon what ground the demurrer was sustained.

1. The respondent contends that the probate court had exclusive jurisdiction to compel defendant to account as guardian, and that its decree, settling his accounts and discharging him from his trust, was final and conclusive; and in support of this position numerous authorities are cited. This is undoubtedly the general rule applicable to the settlement of the accounts of guardians, executors, and administrators, but we do not think it applicable to a case like this. Here, if the averments of the complaint are true, — and they must be assumed to be so for the purposes of this decision, — none of the matters now in controversy were passed upon in the settlement, for the reason that the guardian intentionally and fraudulently concealed from the court and his ward the fact that the latter had then, or ever had, any interest in the property in question. The cases cited state and apply the general rule, but, so far as we have discovered, no one of them goes to the extent of holding that such a settlement can shield a guardian from afterwards being called upon in a court of equity to account for the property so concealed. The rule applicable to the case is correctly stated in *Griffith v. Godey*, 113 U. S. 89. In that case, Mr. Justice Field, in delivering the opinion of the court, said: "It is well established that a settlement of an administrator's account, by the decree of a probate court, does not conclude as to property accidentally or fraudulently withheld from the account. If the property be omitted by mistake, or be subsequently discovered, a court of equity may exercise its jurisdiction in the premises, and take such action as justice to the heirs of the deceased or to the creditors of the estate may require, even if the probate court might, in such case, open its decree and administer upon the omitted property. And a fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity." And see *Estate of Hudson*, 63 Cal. 454; *Dean v. Superior Court*, 63 Cal. 473; *In re Cahalan*, 70 Cal. 604; *Tobelman v. Hildebrandt*, 72 Cal. 316.

2. In support of the second ground of demurrer, it is claimed that the transactions in regard to the land and cattle were entirely distinct, and involved different facts, and that they constituted two distinct causes of action, which should have been separately stated. But as we read the

complaint, it states only one cause of action, namely, for an accounting as to moneys received by defendant, and in part held by him in trust for plaintiff. The money received constituted in defendant's hands a single fund, though derived from sales of real and personal property, and received at different times.

3. The third ground of demurrer seems to be the one mainly relied upon as justifying the ruling of the court, and it is very elaborately discussed by counsel.

The code provides that an action for relief on the ground of fraud or mistake must be commenced within three years; but the cause of action in such case is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake: Code Civ. Proc., sec. 338, subd. 4.

Was the cause of action in this case saved from the bar of the statute by this section? Counsel for respondent earnestly contend that it was not, for several reasons.

(a.) It is urged that the action was not one for relief on the ground of fraud. It is true, the action was for an accounting, but the grievance complained of was, that defendant knowingly received and held moneys in trust for plaintiff, and appropriated the same to his own use, and at all times fraudulently concealed from plaintiff the fact that he had ever received or held any such moneys, or any money in which plaintiff had any interest. It seems to us, therefore, that the averments make a case of the class provided for in the section of the code above cited.

(b.) It is urged that the averments respecting the discovery of the fraud are wholly insufficient. It is said that a party seeking to avoid the bar of the statute on account of fraud must show that he used due diligence to detect it, and if he made any particular discovery, should state when it was made, what it was, how it was made, and why it was not made sooner; and further, that one will be presumed to have known whatever with reasonable diligence he might have ascertained concerning the fraud of which he complains.

The foregoing propositions seem to be well supported by the authorities: *Wood v. Carpenter*, 101 U. S. 140; *Badger v. Badger*, 2 Wall. 94; *Hecht v. Slaney*, 72 Cal. 367. And the question is, whether or not, in view of them, the averments of the complaint are sufficient.

It must be observed that the relations of the parties were

such as would naturally inspire trust and confidence on the part of the plaintiff in the defendant. The defendant was plaintiff's step-father and guardian, and brought him up in his own family and as his own son. Plaintiff always, up to the time of the rupture in 1885, placed implicit confidence in whatever defendant told him, and never doubted its truth. He had no knowledge, and no reason to suspect, that a fraud was being practiced upon him. There was nothing, therefore, to put him upon inquiry, and under such circumstances we do not see how it can be said that he failed to use due diligence to detect the fraud, or how he can be presumed to have known anything concerning it. The complaint does state, we think, when the discovery was made, and what it was, and how it was made, and why it was not made sooner. It is claimed, however, that the averments as to the discovery were of mere conclusions of law, and not of the facts.

It is true that pleadings should state the ultimate facts, and not the probative facts or conclusions of law. But what are ultimate facts, and what conclusions of law, are often mixed and uncertain questions: *Levins v. Rovegno*, 71 Cal. 273; *Turner v. White*, 73 Cal. 299. The same averment may be of a fact or of a conclusion of law, according to the context. We think the averments here complained of should be held sufficient as statements of fact.

(c.) Conceding all that has been said to be true, it is further contended that no cause of action against the defendant respecting the two ranchos or their proceeds is shown.

The argument on this point, briefly stated, is as follows: According to the averments of the complaint, plaintiff's father purchased the ranchos with his own funds; but, at his request, the conveyances thereof were made to his wife, who thereafter held the same as community property. Being community property, the title to the ranchos, under the Mexican law then in force, upon the death of the husband immediately descended to and became vested in the widow and children, without the necessity of any administration: *De la Guerra v. Packard*, 17 Cal. 183; *Scott v. Ward*, 13 Cal. 459. The plaintiff and his mother became tenants in common of the property, and were such at the time of the alleged sale thereof. The mother had no power to sell or convey the plaintiff's interest, and there is nothing to show that she attempted to do so. And if she did, the deeds did not pass or affect his interest in any way. He could afterwards have asserted his right

thereto just as well as if no deeds had been made, and possibly could do so now. The purchase-money received was therefore the money of the mother, in which the plaintiff had no interest.

This argument seems to be sound, and the conclusions reached correct.

A similar claim is made in regard to the cattle and their proceeds, but we do not think it can be sustained. The defendant sold all the cattle and received all of the purchase-money, and converted the same to his own use. As to the plaintiff's interest, the sale was a conversion; but he could waive the tort, and sue in *assumpsit* for his share of the purchase-money, or, under the circumstances shown here, for an accounting: Pomeroy's Remedies and Remedial Rights, sec. 110.

4. We see nothing in the fourth ground of demurrer calling for special consideration. As we read the complaint, it is not ambiguous, unintelligible, or uncertain in any material respect.

We advise that the judgment be reversed and the cause remanded, with directions to the court below to overrule the demurrer.

TEMPLE, C., and FITZGERALD, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded, with directions to the court below to overrule the demurrer.

Rehearing denied.

GUARDIAN AND WARD — CONCLUSIVENESS OF SETTLEMENTS. — Where fraud exists, settlements of guardians do not bind their wards: *McConkey v. Cockey*, 69 Md. 286. Settlements may be set aside for fraud: *Wainwright v. Smith*, 117 Ind. 414; *Line v. Lawder*, 122 Ind. 548; *Slanter v. Favorite*, 107 Ind. 291; 57 Am. Rep. 106; *Crumpler v. Deens*, 85 Ala. 149. But in the absence of fraud, settlements of guardians are conclusive: *Davis v. Hagler*, 40 Kan. 187. And even in the case of fraud, acquiescence by the ward for four years precludes him from impeaching a settlement as against the surety, although the guardian was insolvent: *Aaron v. Mendel*, 78 Ky. 427; 39 Am. Rep. 248, and note.

GUARDIAN AND WARD — STATUTE OF LIMITATIONS. — An action against a guardian for failure to account for moneys due his ward is barred in six years after the majority of the ward: *Lambert v. Billheimer*, 125 Ind. 519. Laches cannot be imputed to a ward who institutes action against his guardian as soon as he discovers the fraud: *McConkey v. Cockey*, 69 Md. 286. Fraud in a guardian's conveyance is presumed to be discovered as soon as the deed is recorded, and seven years thereafter the ward cannot set it aside

on the plea of not knowing of the fraud, the action being otherwise barred by the statute of limitations: *Francis v. Wallace*, 77 Iowa, 373.

LIMITATIONS OF ACTIONS — FRAUD. — The rule is, that the statute of limitations will begin to run in cases of fraud only from the date of discovering such fraud, or from such a time as it could or ought to have been discovered by reasonable diligence: *Jacobs v. Snyder*, 76 Iowa, 522; 14 Am. St. Rep. 235, and note; *Lang Syne etc. Co. v. Ross*, 20 Nev. 127; 19 Am. St. Rep. 337, and note; *State v. Wichita L. etc. Co.*, 73 Tex. 450; *Carrier v. Chicago etc. R'y Co.*, 79 Iowa, 80; but a failure to use such diligence may be excused when there exists a relation of trust and confidence between the parties, rendering it the duty of the party committing the fraud to disclose to the other the truth, and when it was through the acts of the former that the latter was induced to refrain from inquiry: *Gillet v. Wiley*, 126 Ill. 310; 9 Am. St. Rep. 587. But where a debtor, by fraud, obtained a receipt in full from his creditor, an action by such creditor for a balance claimed to be due, brought more than three years after the cause of action accrued, but within three years after discovery of the fraud, was decided as being barred by the statute of limitations: *Jaffray v. Bear*, 103 N. C. 165.

FRAUD — PLEADING. — Fraud and the facts constituting fraud must generally be specifically pleaded: *Kingman etc. R. R. Co. v. Quinn*, 45 Kan. 477; *De Votie v. McGerr*, 15 Col. 467; 22 Am. St. Rep. 426, and note; *Andrews v. King Co.*, 1 Wash. 46; 22 Am. St. Rep. 136, and note. And this rule has been applied to the pleading of fraud as an excuse for not bringing an action within the period fixed for bringing it by statute: *Duncan v. Williams*, 89 Ala. 341.

HUSBAND AND WIFE — COMMUNITY PROPERTY. — The death of either spouse terminates the community, and the succession becomes seized of one undivided half of the community property: *Webre v. Lorio*, 42 La. Ann. 178.

CONVERSION, WHAT ACTS CONSTITUTE: See extended note to *Bolling v. Kirby*, 24 Am. St. Rep. 795-819.

CONTRACTS — TORTS. — As to when and under what circumstances a party may waive a tort and sue in *assumpsit*, see note to *Webster v. Drinkwater*, 17 Am. Dec. 242-247, wherein is discussed actions for conversion of property.

HEWITT v. DEAN.

[91 CALIFORNIA, 617.]

JUDGMENT — RESTITUTION AFTER MODIFICATION. — If a judgment is modified on appeal by reducing the amount of the recovery, the appellant is not entitled to have a sale made of the property to a party to the action, for an amount less than the judgment as modified, vacated, though the statute declares that when a judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order.

Victor Montgomery, for the appellants.

Ray Billingsley, for the respondent.

HARRISON, J. Motion on behalf of the appellants to set aside a sale of property made under the judgment at the instance of the respondent.

The court below rendered judgment in favor of the plaintiff and against the defendants for the sum of \$3,149.60, the amount of the promissory note sued on, and \$300 attorney's fees, and directed that the lands mortgaged to secure the same be sold by the sheriff. From this judgment the defendants appealed to this court, but did not file an undertaking staying proceedings upon the judgment appealed from. After the appeal was taken, the plaintiff caused an order of sale to issued upon the judgment, and at a sale thereunder, made August 8, 1890, purchased the the mortgaged premises for the sum of three thousand dollars, which was credited upon the amount of the judgment. Upon the determination of the appeal in this court, the court below was directed "to modify the judgment by reducing the amount allowed for attorney's fees to \$125, as of the date the judgment appealed from was entered," and as so modified the judgment was to stand affirmed.

Section 957 of the Code of Civil Procedure provides: "When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order," etc. This provision has been a part of the rule of procedure in this state since June, 1853: Stats. 1853, p. 289; Practice Act, sec. 345. In *Farmer v. Rogers*, 10 Cal. 335, the supreme court, construing this provision, say: "It applies only to those cases where the judgment operates upon specific property in such a manner that its title is not changed, as by directing the possession of real estate, or the delivery of documents, or of particular personal property in the hands of the defendant, and the like." In that case, however, the sale under the judgment appears to have been made to parties other than the plaintiffs in the action, and in that respect differs from the case under consideration; but the language of the court is general in its statement of the application of the provision.

The provision of the code under which the relief is sought authorizes this court to make restitution "of all property and rights lost by the erroneous judgment," in case the judgment appealed from is reversed or modified. The judgment in the present case was not reversed, nor was it modified to such an extent that the defendants can be said to have "lost" any property or rights thereby. The judgment as originally entered was for the sum of \$3,492.50, besides costs of suit, and it was modified by the judgment of this court by merely

striking therefrom the sum of \$175, and in other respects was affirmed, whereas the sum for which the property was sold was only \$3,000.

The rule under which property bid in by the plaintiff at an execution sale under his judgment is restored to the defendant if the judgment be afterwards reversed has no application. In such a case the reversal of the judgment is a judicial determination that the plaintiff was not entitled to the judgment, and it would be contrary to reason to hold that the defendant should not be restored to the estate which had been taken from him by the plaintiff under a process of law, for the purpose of satisfying a demand which it was afterwards judicially determined he did not owe. If the judgment is reversed, there would be no foundation for the title under which the plaintiff claims to hold the property of the defendant, and he must surrender it. For such purpose, however, he must make application to the court out of which the process issued. That court is the custodian of the records in the suit, and is the proper tribunal to supervise the action of its officers in enforcing its judgments, or to cause restitution to be made of property improperly applied in satisfaction of its judgments. Unless, however, the judgment is reversed, the principle does not apply, and upon a modification of the judgment to such an extent merely that the defendant is thereby relieved from only a part of the judgment, it cannot be said that he has "lost" any property or rights "by the erroneous judgment," unless more of his property has been taken than the amount for which the judgment has been affirmed. In the present case, inasmuch as it appears from the affidavit on behalf of the defendants that property amounting to only three thousand dollars has been taken in part satisfaction of a judgment amounting to a much greater sum, it would be not in accordance with either equity or the provisions of the code to order the property to be restored to them.

The motion is denied.

APPEAL — JUDGMENTS. — For a discussion of the rights of restitution of persons dispossessed under judgments afterwards set aside or reversed, see *Quan Wo Chung Co. v. Laumeister*, 83 Cal. 384; 17 Am. St. Rep. 261, and extended note 264-266.

[IN BANK.]

STEVENSON v. COLGAN.

[91 CALIFORNIA, 649.]

CONSTITUTIONAL LAW — LOOKING BEHIND STATUTE TO SEE WHETHER IT IS CONSTITUTIONAL. — If a statute appears on its face to be constitutional and valid, the court cannot inquire into the motives of the legislature, or the consideration upon which it was founded, and then disregard it if it would have been unconstitutional had such circumstances or consideration appeared on its face.

CONSTITUTIONAL LAW. — STATUTE CANNOT BE ASSAILED AS GIFT and declared void as in violation of a clause of the constitution forbidding the making of any gift, when the purpose of the statute as disclosed by its contents is proper and within the legislative power.

CONSTITUTIONAL LAW. — GIFTS. — A STATUTE DOES NOT APPEAR TO BE VOID AS A GIFT from the fact that it directed a designated sum to be paid monthly to a particular person in full satisfaction of all claims he may have, or claim to have, against the state, such payments to cease should he die before the expiration of the time named.

Barham and Bolton, for the appellant.

George A. Wentworth and A. P. Van Duzer, for the respondent.

DE HAVEN, J. This is an application for a writ of *mandamus* to be directed to the defendant as state controller, commanding him to draw a warrant on the state treasurer for the sum of \$125, to which amount petitioner claims he is entitled by virtue of the provisions of an act of the legislature approved March 31, 1891. The act is entitled "An act for the relief of Jonathan D. Stevenson, and to appropriate money therefor," and so far as necessary to be stated here, it is as follows: —

"Sec. 1. The sum of \$125 per month, payable monthly, for the period of twenty-one months, is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, for the relief of Colonel Jonathan D. Stevenson; provided, however, that said appropriation shall cease upon the death of said Stevenson, if he shall die before said period has elapsed; the sums paid under the provisions of this act to be accepted by the said Stevenson in full payment and satisfaction of all claims of every kind and nature that he may have, or claim to have, against said state for services or otherwise."

The answer of the defendant alleges that petitioner never at any time had or has "any claim of any kind or nature whatsoever against the state of California for services rendered, or for any other thing done, had, or performed by the said Jonathan Stevenson, or for anything of value furnished to the

state of California," and that the appropriation made by the said act of the legislature was intended as a gift to the petitioner.

The answer then proceeds in an informal way to allege that prior to the admission of California as a state, the petitioner expended money and performed services "in surveying and preparing charts of the bay of Suisun and the Sacramento and San Joaquin rivers," and, in substance, avers that this service and expenditure of money constitute the foundation of petitioner's alleged claim against the state, and for which the appropriation contained in the act referred to was made.

A demurrer to the answer was sustained by the court below, and thereupon judgment was rendered in favor of petitioner, as demanded in his petition. The defendant appeals.

Section 31 of article 4 of the constitution provides that the legislature shall have no power "to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual," and section 32 of the same article also declares: "The legislature shall have no power to grant or authorize any county or municipal authority to grant any extra compensation or allowance to any public officer, agent, servant, or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part."

By these provisions of the constitution, there is denied to the legislature the right to make direct appropriations to individuals from general considerations of charity or gratitude, or because of some supposed moral obligation resting upon the people of the state, and such as a just and generous man, although under no legal liability so to do, might be willing to recognize in his dealings with others. It was because of abuses which had crept into legislation by reason of the unlimited power theretofore exercised by the legislature in determining what individual claims should be recognized by private statute, and to relieve in some degree legislators from the importunities of persons interested in securing such appropriations, that the power of the legislature was thus limited by the present constitution of this state. In this view, there can be no doubt that if the facts are as alleged in the answer of defendant, the act under consideration ought never to have been passed. But these facts do not appear upon the face of the act itself, and the question is thus presented, whether it is competent for the court in this or any form of action to receive evidence *aliunde* to establish such facts, and

thus to impeach and overthrow a law which, upon its face and independent of proof, is presumptively valid. This case as thus presented is to be distinguished from those in which it has been held that the court may look into the journals of the legislature for the purpose of determining whether a statute was in fact passed by the requisite votes required by the constitution. In such cases the question is, whether the law was in fact enacted, and not whether the legislature, in passing the statute, properly discharged its duty by the preliminary ascertainment of facts which alone would justify such legislative action.

In our opinion, the question which we have stated as the one for decision here must be answered in the negative. While the courts have undoubted power to declare a statute invalid, when it appears to them in the course of judicial action to be in conflict with the constitution, yet they can only do so when the question arises as a pure question of law, un-mixed with matters of fact the existence of which must be determined upon a trial, and as the result of, it may be, conflicting evidence. When the right to enact a law depends upon the existence of facts, it is the duty of the legislature, before passing the bill, and of the governor before approving it, to become satisfied in some appropriate way that the facts exist, and no authority is conferred upon the courts to hear evidence, and determine as a question of fact whether these co-ordinate departments of the state government have properly discharged such duty. The authority and duty to ascertain the facts which ought to control legislative action are, from the necessity of the case, devolved by the constitution upon those to whom it has given the power to legislate, and their decision that the facts exist is conclusive upon the courts, in the absence of an explicit provision in the constitution giving the judiciary the right to review such action. We therefore hold, that in passing upon the constitutionality of a statute, the court must confine itself to a consideration of those matters which appear upon the face of the law, and those facts of which it can take judicial notice. If the law, when thus considered, does not appear to be unconstitutional, the court will not go behind it, and, by a resort to evidence, undertake to ascertain whether the legislature, in its enactment, observed the restrictions which the constitution imposed upon it as a duty to do, and to the performance of which its members were bound by their oaths of office.

"If evidence was required, it must be supposed that it was before the legislature when the act was passed, and if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be equivalent to such finding": Cooley's Constitutional Limitations, 187.

This view seems to be sustained by the decisions of the highest courts of other states, and is in harmony with the central idea of the constitution in prescribing the independence and equality of the three great departments of the state. The following are some of the cases which, in principle, sustain the conclusion we have reached: *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 345; *Rumsey v. People*, 19 N. Y. 41; *Hovey v. Foster*, 118 Ind. 502; *Lusher v. Scites*, 4 W. Va. 11; *De Camp v. Eveland*, 19 Barb. 81.

If experience shall demonstrate that further restriction upon legislative power over the subject of appropriations of public money is necessary, it is within the power of the people to so amend the constitution as to provide that, notwithstanding an appropriation made by the legislature for its payment, the legality of every claim against the state shall or may be the subject of judicial investigation as to the facts upon which it rests. But, in the absence of a plain direction to that effect, the courts are not authorized to institute such an inquiry.

As already stated, the act in question does not show upon its face the nature of the claim which the petitioner made against the state, or that the appropriation thereby made is a gift. The statute is unusual in form, and it may be difficult to assign any good reason for the singular provision that the state shall discharge by monthly installments the indebtedness which the act admits, and, in the event of petitioner's death before it is fully paid, shall be released from the payment of any balance then due; but, this does not affect the question of the power of the legislature to so provide, nor authorize the court to declare that the act was enacted in absolute disregard of the constitution.

Judgment affirmed.

STATUTES — CONSTITUTIONALITY. — Motives of the legislature in passing an act cannot be regarded by the judiciary upon the question of its constitutionality: *Mayor etc. of Baltimore v. State*, 15 Md. 376; 74 Am. Dec. 572. If it cannot be made to appear that the statute is in conflict with the constitution, by argument deduced from the language of the law itself, or from matters of which the court can take judicial notice, the act must stand:

People v. Durston, 119 N. Y. 569; 16 Am. St. Rep. 859. Courts are reluctant to consider the question of the constitutionality of a statute, and all reasonable doubts must be resolved in favor of its constitutionality: *Henderson v. Robinson*, 76 Iowa, 603; *State v. Hope*, 100 Mo. 347; *Bush v. Indianapolis*, 120 Ind. 476; *Cook v. Portland*, 20 Or. 580; *Bates v. Gregory*, 89 Cal. 388; *Bingham v. Birmingham*, 103 Mo. 345; *People v. Hayne*, 83 Cal. 111; 17 Am. St. Rep. 211, and note. When the words of a statute are plain and clear, the court cannot, even to give effect to what is supposed to be the intention of the legislature, put a construction upon its provisions not warranted by the words thereof: *State v. Simon*, 20 Or. 365.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

CHARTRAND v. BRACE.

[16 COLORADO, 19.]

INSURANCE — BENEFIT SOCIETY — CERTIFICATE AS CONTRACT OF INSURANCE.

— The Ancient Order of United Workmen, so far as it is engaged in the business of life insurance, is to be treated in law as a mutual life insurance company; and a certificate of membership and insurance therein is to be regarded as a written contract, and, so far as it goes, it is the measure of the rights of all parties.

INSURANCE IN BENEFIT SOCIETY TREATED AS WILL. — A policy of life insurance in a mutual benefit society is in the nature of a testament; and in construing it, the court will, as far as possible, treat it as a will.

INSURANCE IN BENEFIT SOCIETY — WHEN VESTS IN BENEFICIARY. — When a certificate of insurance in a mutual benefit society provides that upon the death of the member named therein the insurance shall be paid to his wife, or in case of her death to his children, she has a vested right to the fund upon the death of her husband, and upon her subsequent death the fund vests in her administrator as part of her estate.

ACTION on a certificate of insurance. Sterling D. Rouse, at the time of his death, was a member in good standing of the Ancient Order of United Workmen, and his certificate of membership entitled the beneficiary named therein to two thousand dollars insurance on his life at the time of his death. The disposing clause of the certificate provided that such "sum shall at his death be paid to his wife, Ella A. Rouse, and in case of her death to Mary E., Clara D., and Anna L. Rouse, children." S. D. Rouse died, leaving as survivors his wife and children, and before the insurance money had been paid to the wife, she also died, leaving the children surviving. Brace, the appellee, was appointed the administrator of Ella A. Rouse, and commenced suit against the society to recover

the insurance as part of her estate. The children also claimed the insurance, and were substituted as parties defendant to enable them to assert their claim to the insurance money. The appellant Mrs. Mary E. Chartrand was, before her marriage, the Mary E. Rouse named as one of the children in the certificate of insurance. Judgment was rendered in favor of the plaintiff and administrator, Brace, on the pleadings, and Mrs. Mary E. Chartrand, together with the other said children, appealed.

Charles M. Campbell and James M. North, for the appellants.

O. F. A. Greene, for the appellee.

HAYT, J. The amended answer admits, by failing to deny, the facts as stated in the complaint, and for the purposes of this appeal the new matter set up in this answer must also be taken as true. Upon these facts, the position of appellee is, that upon the death of the insured the right to the fund vested absolutely in the wife, Ella A. Rouse, and that upon her death the right to the uncollected fund passed as part of her estate to her administrator, to be by him disposed of as other assets of the estate. The contention of appellant is, that as the fund had not been paid over or collected at the time of the death of the wife, the right thereto became vested in the children under the terms of the policy.

The certificate is, in legal contemplation, a policy of life insurance, and to be construed as such. That the amount can only be collected by assessment upon members of the association after due notice of death, and the payment of such assessment is purely voluntary, can make no difference. The association, so far as it is engaged in the business of life insurance, must be treated in law as a mutual life insurance company. The certificate is to be regarded as a written contract, and, so far as it goes, it is the measure of the rights of all parties: *Bolton v. Bolton*, 73 Me. 299; *Commonwealth v. Wetherbee*, 105 Mass. 149; *State v. Farmers' etc. Ass'n*, 18 Neb. 281; *Wiggin v. Knights of Pythias*, 31 Fed. Rep. 122; *Knights of Honor v. Nairn*, 60 Mich. 44; *State Ins. Co. v. Horner*, 14 Col. 391.

Turning to the policy executed in this case, we find the disposing clause to be couched in the following language: "Which sum shall at his death be paid to his wife, Ella A. Rouse, and in case of her death to Mary E., Clara D., and

Anna L. Rouse, children." It would be difficult to find language to more clearly and definitely fix the time at which the right to this money vested in Ella A. Rouse than the words "at his death."

It is claimed, however, that the words following, "in case of her death to Mary E., Clara D., and Anna L. Rouse, children," qualify the words immediately preceding, and that, when construed together, they give to the children a right to the fund so long as the same is capable of practical identification and control, and has not been otherwise appropriated by the wife, although the wife in fact survives the husband. But the plain intent of the language of the policy is against such construction. The words "which sum shall at his death" fix the time at which the right to the fund is to be determined, and the words following provide for the payment to the children in case the wife shall not be living at that time. The children were only to receive the money upon the happening of certain contingencies. The risk taken by the association was upon the life of the assured. By his death, the policy became fixed, and the right to the fund vested. The wife having survived the husband, her right became absolute by the express terms of the policy. This construction finds support not alone in the language of the contract, but is also in accordance with the settled policy of the law, which is, to favor vested, rather than contingent, estates, — the first, rather than the second, taker: *King v. Frick*, 135 Pa. St. 575; 20 Am. St. Rep. 889; *Smith's Appeal*, 23 Pa. St. 9; *Womrath v. McCormick*, 51 Pa. St. 504; *Felton v. Sawyer*, 41 N. H. 202; 2 Redfield on Wills, *253; *Union Mut. Ass'n v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519.

A policy of life insurance is in the nature of a testament, and although not a testament, in construing it the courts will, so far as possible, treat it as a will: *Bolton v. Bolton*, 73 Me. 299. In *King v. Frick*, 135 Pa. St. 575, 20 Am. St. Rep. 889, an absolute devise was made by a father to his son, followed by a proviso to the effect that in case the devisee should die without children, grandchildren, or wife living, the estate should go over. The words "die without children," etc., were held to refer to the death of the son in the lifetime of the testator, and the son, having survived the testator, was declared the owner of the fee.

The case of *Union Mut. Ass'n v. Montgomery*, 70 Mich. 587, 14 Am. St. Rep. 519, is in some respects quite analogous to

the case at bar. It was provided by the certificate issued in that case that the insurance should be paid to the son and daughter of the insured equally, if living, and if not living, to his heirs; in case of the death of either the son or daughter, the full amount was to be paid to the survivor; and the court held the provision as to survivorship related to the time of the death of the donor. And it appearing that both beneficiaries were living at that time, although one had died before the payment of the benefit, his executor was entitled to the share, and not the survivor. In the course of the opinion the court said: "The scheme of the corporation is to raise a fund which shall pass to designated beneficiaries at the death of the member. The right, which before was inchoate and contingent, becomes upon the death of the member fixed and certain in the beneficiary. . . . The time of payment provided for, namely, ninety days after the death of the member, has no reference to who shall take as survivor."

So in the case at bar, we are of the opinion that, by the express terms of the policy, the right to the fund became vested in Ella A. Rouse upon the death of her husband. Consequently, upon her death, the fund should pass to the administrator as a part of her estate. There is nothing in the constitution or by-laws of the association, as pleaded, to change this result. Whatever rights, if any, may have been reserved to the society by these instruments have been waived by it, and the fund deposited subject to the order of the court.

While we feel that our conclusion as to the party entitled to the fund must necessarily follow as a matter of law, in answer to the argument of counsel based upon the duty of the deceased father to provide for his children, it may be said that it was equally his duty to provide for his invalid wife. She was the person having the strongest claim upon his estate and bounty. If the construction contended for by counsel be adopted, the wife could not use the fund, no matter to what extremity she may have been driven in the final sickness intervening between the death of her natural and legal protector and her own death. She could not, by anticipating the payment of the legacy, surround herself with the things that might have been absolutely necessary to sustain her life from day to day.

In addition to this, it would place the beneficiary primarily entitled to the fund to a great extent within the power of the

insurer. For instance, by withholding payment, the beneficiary would be compelled to bring suit for the money, the ultimate decision of which might be delayed for years; and if during the time the wife should die, others would receive the reward of her endeavors without sharing the expense. Under such circumstances, it is easily to be seen that the insurance corporation or association could compel the wife, in many instances, to accept less than the face of the policy, rather than institute a suit, no matter how clear her right of recovery might be.

We think the judgment of the district court is right, and it is accordingly affirmed.

MR. JUSTICE ELLIOTT dissented from the opinion of the court, and contended that, under a proper construction of the certificate in suit, considered in connection with the circumstances of the case, the insurance money vested, upon the death of Mrs. Ella A. Rouse, in the children named in the certificate. A former opinion in the case had been unanimously concurred in by the court, but was withdrawn at the time the present opinion was filed, and Judge Elliott, in registering his dissent, adopted the former opinion. In that opinion it was said, that "while the certificate is to be construed as a contract, nevertheless, it being in the nature of a policy of insurance, — a *post-mortem* provision for the benefit of those dependent upon the assured for support, — it is, like the provisions of a will, to be liberally construed in favor of those who may naturally be presumed to have been the objects of their father's bounty."

"It is claimed by counsel for the administrator, that by the terms of the certificate the right to the insurance money vested in Ella A. Rouse immediately upon the death of her husband. This claim is based upon the words of the certificate, that the money shall, 'at his death, be paid to his wife, Ella.' But these are not the only words of the instrument relating to that subject. It also contains the words 'in case of her death'; that is, it is further provided that in case of the death of the wife, Ella, the money shall be paid to Mary, Clara, and Anna, children of the assured. In argument, however, counsel have sought to maintain the administrator's claim by construing the certificate, — 1. As though the children were not named therein as beneficiaries; and 2. As though they were only entitled to the insurance in case the wife should die before the death of the assured. The argument is not well founded. It violates an elementary rule for the construction of contracts, in that it does not give effect to the whole language of the instrument. In the first instance it omits, and in the second adds, important words. The effect of the addition, as well as the omission, is to defeat the clearly expressed intention of the assured. It is true, the certificate was framed so that the wife's right vested immediately upon her husband's death; but such right was not indefeasible. On the contrary, it was subject to be divested by her own death. The certificate expressly provides that in case of the wife's death the insurance shall be paid to the children; and thus provision was made for the vesting of the children's rights just as surely as for the vesting of her own. This last provision is in no way limited or qualified as to the time of her death; it is direct and unequivocal to

the effect that in case of the wife's death, either before or after the death of the assured, the money shall be paid to the children named in the certificate. The intention is clear, that in the event of the wife's death at any time while the insurance money should be unpaid, so as to be capable of practical identification and control, it should be paid to the children, thus giving them the greatest advantage that could arise from such a contingency, so long as the fund should not be otherwise appropriated by the wife. Thus effect is given to the entire certificate, without doing violence to its obvious meaning or to any of its words, and thus a construction is reached in accordance with well-settled legal rules, as well as in harmony with the dictates of reason and humanity."

"Reading the certificate in the light of the extrinsic circumstances as shown by the amended answer, and considering the condition of the assured, and of the different members of his family, and the relations they sustain to each other at the time of effecting the insurance, no one can doubt for a moment that it was the father's intention that the insurance money should be paid to his infant daughters in case his invalid wife should die either before his own death should occur or before the money should be paid to her. These children were his legitimate heirs, dependent upon him for support, and, next after his wife, the natural objects of his bounty. They were not the children of his wife, Ella, and could not inherit from her; hence we perceive his prudent foresight, as well as fatherly care, in causing their names to be inserted as beneficiaries in the certificate, contingent upon his wife's expected death.

"If anything further were needed to strengthen the construction we have given this instrument, the objects, purposes, rules, and regulations of the benevolent order from which this certificate of insurance emanated might be considered. But it is scarcely necessary to invoke cumulative authority to confirm the view that it was the father's intention, in case of his wife's death, that the insurance money should go to his doubly orphaned minor children, instead of the administrator of the deceased wife, either for the payment of her debts, or for the benefit of her heirs, who were to him as strangers, having no special claim upon his fortune, his benevolence, or the fruits of his labor."

Mr. Justice Elliott then said, that without questioning the correctness of "the adjudicated cases cited in behalf of the administrator's claim, they do not necessarily militate against the foregoing construction," and that in such cases "it is always safer to be guided by legal principles, founded on justice and equity, than to attempt to follow case precedents based on facts or circumstances not strictly analogous or controlling."

The learned judge, continuing, said: "Much stress is laid upon the rule that the law favors vested estates in preference to contingent, unless an intention appears to the contrary. It will be noticed that the rule thus stated is pregnant with two very important and significant admissions: 1. That contingent estates may be created; and 2. That the intention of parties creating an estate is to be considered in determining its character. Let us test the certificate in the light of this rule. It cannot be denied that a contingent estate is contemplated by its express terms; indeed, a series of contingencies are contemplated. In the first place, the very object of procuring the certificate of insurance was to provide for the family of the assured in the contingency of his own death while they, or some of them, were living. The first contingency was, that the insurance money should be paid to his wife. Thus far there is no dispute. It is also undisputed that in a certain

contingency the insurance should be paid to his children. What was the latter contingency? It is plainly stated in the certificate to be the contingency of the wife's death, — no more, no less. There are no other words limiting or qualifying the latter contingency. First, then, the husband, anticipating his own death, procures the insurance for his wife's benefit; second, knowing that his wife, according to the course of nature, must certainly die sometime, he provides that in case of her death the insurance shall be paid to his children. The wife being an invalid, and presumably older than his minor children, it is reasonable to presume the assured expected them to survive her death. In the light of such facts and circumstances, what intention is conveyed by the terms of the certificate? The entire operative words have been considered. Nothing has been added thereto or subtracted therefrom. Legitimate facts and circumstances only have been taken into consideration in construing the language of the written instrument. The reasonable legal inference to be drawn from such language, under the circumstances, is, that the father intended the insurance should go to the invalid wife for her use while living, with remainder to his own children in the contingency of the wife's death, whenever it should occur; and so he used the unlimited words 'in case of her death to be paid to the children,' inasmuch as they could not inherit from their step-mother. Words might have been inserted in the certificate providing for the payment of the insurance to the children only in the contingency of the wife's death before the death of the assured. If such words had been inserted, they would necessarily have controlled the interpretation of the instrument. But such words were not inserted, and they certainly should not be supplied by implication when from all the facts and circumstances legitimate to be considered in construing the instrument the obvious effect of supplying them, as contended by appellee, would be to defeat, not to effectuate, the intention of the assured."

MUTUAL BENEFIT ASSOCIATIONS. — The doctrine generally maintains that mutual benefit associations, so far as they are engaged in the mutual insurance of the lives of their members, are to be deemed insurance companies, and subject to the laws governing such companies. The certificates of membership issued by a mutual benefit association do not differ materially from ordinary policies of mutual life insurance, and are construed and governed by the rules applicable to the latter: *Note to Bankers' etc. Ass'n v. Stapp*, 19 Am. St. Rep. 781, 782; *Block v. Valley M. Ins. Co.*, 52 Ark. 201; 20 Am. St. Rep. 166. Upon the death of a member, the interest of the last-named beneficiary becomes vested: *Note to Bankers' etc. Ass'n v. Stapp*, 19 Am. St. Rep. 789, 790; *Mich. Mut. B. etc. Ass'n v. Rolfe*, 76 Mich. 147; and in case of the death of such beneficiary without disposing of such vested interest, and before payment, it passes to his personal representatives: *Mich. Mut. B. etc. Ass'n v. Rolfe*, 76 Mich. 147. The beneficiaries appointed by the holder of a certificate in a mutual benefit association payable on his death according to his direction acquire merely a contingent interest, where the laws of the association reserve to the members the power of substituting other beneficiaries for those originally named in the certificate: *Knights of Honor v. Watson*, 64 N. H. 517.

DENVER, TEXAS, AND GULF R. R. Co. v. SIMPSON.

[16 COLORADO, 55.]

RAILROADS—NEGLIGENCE—INJURY TO BRAKEMAN.—In an action by a brakeman against a railroad company to recover for an injury received in attempting to couple cars on a dark night, evidence that the company failed to furnish a sufficient number of suitable links with which to make the necessary couplings, that the conductor ordered such brakeman to make a coupling with an unsuitable link, and that an attempt to obey the order resulted in the injury sued for, will justify a recovery.

RAILROADS—NEGLIGENCE—CARE REQUIRED OF INJURED BRAKEMAN.—Where a railroad company is guilty of negligence in failing to provide its train with a sufficient number of suitable links to make necessary couplings, and in directing its brakeman to use a defective link in making a coupling, the brakeman, in attempting to obey the order, is only required to exercise such care as might reasonably be expected from a person of ordinary care and prudence in the situation in which he was then placed, and if injured while in the exercise of such care, he is entitled to recover.

Wells, McNeal, and Taylor, and Teller and Orahoad, for the appellant.

T. C. Early, J. B. Belford, and J. W. Mullahey, for the appellee.

HAYT, J. In the court below, appellee, as plaintiff, obtained judgment for the sum of eight hundred dollars for bodily injuries sustained by him while in the employ of appellant in the capacity of brakeman upon its railroad. It is shown by the record that at the time of the accident appellant was operating a line of railroad in this state between the cities of Denver and Pueblo; that appellee was in its employ as brakeman on one of its freight trains running between said points; that upon the morning of the day of the accident the train upon which appellee was employed left the city of Denver, going south, upon schedule time; that said train was not then properly supplied with links with which to make the couplings necessary to be made upon the contemplated run; that appellee endeavored to provide the train with the requisite number of links before starting from the city of Denver, but was prevented from so doing by reason of the negligence of appellant in failing to furnish such links.

About eight o'clock upon the evening of said day, appellee, in his capacity as brakeman, was required to make a coupling at Franceville Junction, upon the line of said railroad. In making that coupling appellee sustained the injury for which damages were recovered in the court below. The facts

attending the accident are practically undisputed, the witnesses introduced by the plaintiff agreeing as to all material particulars, while the only attempt made to overthrow this testimony rests upon evidence of admissions claimed to have been made by the plaintiff to other employees of the company shortly after the accident. By such evidence contributory negligence on the part of appellee was attempted to be established.

It is shown that the draw-heads of the two cars which appellee was required to couple were of unequal heights above the tracks, making the coupling somewhat difficult. The night was dark, cold, and stormy, the supply of links furnished the train by the company was exhausted; none remained with which to make this coupling. In this extremity, and as the train was coming down the side-track to the cars to be joined with it, appellee was searching about the tracks to find a link with which to make this necessary coupling. At this juncture the conductor in charge of the train ordered him to take a link laying upon the ground near the side-track and make the coupling with it. The accident occurred while appellee was endeavoring to execute this command.

The link pointed out by the conductor not being a suitable one with which to make the coupling, it caused appellee's hand to be crushed between the cars. As described by the witnesses upon the stand, it was a bent link, as distinguished from a crooked link, — a crooked link being one crooked in a particular way for the purpose of making couplings in cases where the draw-heads of the cars to be connected are of different elevations above the track, while a bent link is one that has become misshapen by use.

In view of the evidence, the verdict of the jury, in favor of appellee, cannot be disturbed. He was acting at the time under the immediate direction of his superior, the conductor, who had charge of the train and of the brakemen employed thereon, including appellee. Appellee did not discover the defect in the link in time to avoid the accident. He could not well do so in the darkness. He was required to act promptly in making the coupling, without time for investigation or opportunity for reflection. Under the law, he was only required to exercise such care as might reasonably be expected from a person of ordinary care and prudence in the situation in which plaintiff was then placed. In view of the

facts, it cannot be said as a matter of law that he did not exercise reasonable care. On the other hand, the company is properly chargeable with negligence in failing to provide the train with a sufficient number of links in the first instance, and again in directing appellee to use the defective link. The duty of the master to supply the servant with suitable machinery and appliances for the work to be performed is universally recognized: *Denver etc. R'y Co. v. Driscoll*, 12 Col. 520; 13 Am. St. Rep. 243; *Wells v. Coe*, 9 Col. 159; *Hough v. Railway Co.*, 100 U. S. 213.

Some of the witnesses for appellant testified that soon after the accident appellee stated that the accident was caused by his glove sticking to the link, the glove being wet at the time. Evidence was introduced, however, to show that the accident was not so caused, and that if appellee made the statements attributed to him, he was in error in so doing. It was also in evidence that the glove was not wet, and that its use under the circumstances was reasonable and proper. All these matters, together with the law in relation to unavoidable accident and contributory negligence, were fully submitted to the jury under proper instructions; the damages are not excessive, and we see no reason for disturbing the verdict: *Gilmore v. Northern Pac. R'y Co.*, 18 Fed. Rep. 866; *International etc. R. R. Co. v. Doyle*, 49 Tex. 190.

In its essential features, the case is entirely dissimilar from the case of *Wells v. Coe*, 9 Col. 159, relied upon by appellant. In that case Coe, the party injured, was "foreman and boss of the workmen." His authority at the mine was plenary, save, perhaps, at such times as Wells might happen to be present. He had charge of the workmen and control of the machinery. By his orders the means provided to prevent just such accidents as the one causing the injury complained of were dispensed with, thereby making the accident possible, and it was rightfully held, under these circumstances, that he could not recover.

It is contended that all evidence of the insufficiency of the supply of links upon the train was inadmissible under the pleadings. An examination of the complaint and answer shows that this was one of the matters directly put in issue; consequently the evidence was properly admitted. The judgment will be affirmed.

RAILROADS — DEFECTIVE APPLIANCES — INJURY TO BRAKEMAN. — If a brakeman is injured through the defective and dangerous condition of a car,

the condition of which was known to the conductor, he is entitled to recover for such injury: *Richmond etc. R. R. Co. v. Williams*, 86 Va. 165; 19 Am. St. Rep. 876, and note. A brakeman in coupling cars does not assume the risk of injury through defective coupling appliances: *Goodrich v. New York etc. R. R. Co.*, 116 N. Y. 398; 15 Am. St. Rep. 410, and note. See extended note to *Buzzell v. Laconia Mfg. Co.*, 77 Am. Dec. 218. A brakeman may recover for an injury sustained in making a coupling in obedience to the order of the conductor, who knew that the cars were in such a dangerous condition as to imperil the life of the brakeman: *Louisville etc. R. R. Co. v. Brice*, 84 Ky. 298.

STRICKLER v. CITY OF COLORADO SPRINGS.

[16 COLORADO, 61.]

WATERCOURSES — RIPARIAN RIGHTS. — PRIORITY OF APPROPRIATION OF WATER IN POINT of time gives superiority of right among appropriators for like beneficial purposes.

WATERCOURSES — APPROPRIATOR'S RIGHT IN TRIBUTARIES. — PRIOR APPROPRIATOR of water from the main stream is not subject to subsequent appropriation from its tributaries by others.

WATERCOURSES — APPROPRIATION — CHANGING POINT OF DIVERSION. — A prior appropriator of water from a stream may change the point of diversion and the place of use, without affecting his right of priority, so long as the rights of others are not thereby injuriously affected.

WATERCOURSES — APPROPRIATION — SALE OF WATER RIGHT. — The prior appropriator's right to the use of the water of the stream is a property right which he may transfer by sale, unconnected with the land, so long as the rights of others are not injuriously affected thereby.

WATERCOURSES — RIGHT OF PRIOR APPROPRIATOR — CONSTITUTIONAL LAW. — The right of a prior appropriator to the use of the water of a stream acquired prior to the adoption of the Colorado constitution cannot be taken by a city for domestic use without compensation.

CONSTITUTIONAL PROVISIONS OPERATE PROSPECTIVELY only, unless a contrary intention clearly appears from the words employed.

BILL by the plaintiff, as owner of a water right for irrigation purposes on Fountain Creek, for an injunction restraining the defendant from purchasing other like water rights on said creek, and from diverting such water to the use of the city. From the agreed statement of facts it appeared that the defendant city has and maintains a system of water-works for the purposes of furnishing its inhabitants with water for domestic purposes; that defendant has, for the purposes of supplying its water-works, the prior water rights upon Ruxton Creek, and that its pipe line and reservoir take substantially all the water of that creek, so that none of it reaches Fountain Creek below; that Ruxton Creek is about five miles in length and is fed and formed by streams coming together above the

place of intake of defendant's pipe line; that Ruxton Creek and Fountain Creek join and flow together at a point below the intake of defendant's pipe line, and the waters of said creeks at their junction are naturally of about equal volume; that there are below the junction of said creeks, and upon Fountain Creek, a great number of water rights for irrigation purposes that are prior to defendant's right upon Ruxton Creek, and sufficient to take all the waters of Fountain Creek after receiving the waters of Ruxton Creek; that plaintiff is the owner of a water right for irrigation purposes on Fountain Creek that is prior to any appropriation of the defendant of the water of Ruxton or of Fountain creek, and which is impaired by defendant's appropriations of water from them; that defendant is also the owner of a ditch which takes water directly from Fountain Creek for the use of its inhabitants; that both said pipe line and ditch are necessary for its water supply; that defendant has, for a number of years, been continuously thus taking the water of Fountain Creek through its said ditch, and the waters of Ruxton Creek through its said pipe line, under a claim of right to do so, "though the plaintiff and other prior appropriators of waters of said Fountain Creek have been, to a greater or less degree, for and during said period, injuriously affected thereby, they have failed to object thereto, and to assert any prior rights of appropriation he or they had to the water so taken by defendant, yet said persons, including the plaintiff, now claim damages therefor of the defendant, and the full amount of their original appropriations, without diminution of the amounts so taken and appropriated by the defendant, which defendant will pay them unless enjoined"; that defendant is about to purchase some of the water rights from said Fountain Creek that are prior to its ditch and pipe line, with the view of taking the water so purchased through its ditch and pipe line for the use of its inhabitants. Plaintiff prays that defendant be enjoined from making such purchase, and for general relief. Judgment denying the relief sought, and plaintiff appeals.

T. A. McMorris, for the appellant.

William Harrison, for the appellee.

HAYT, J. The points upon which a decision is asked as given upon the oral argument may be stated as follows:
1. Are the rights of a junior appropriator of water from a trib-

utary stream subject to the rights of a prior appropriator from the main stream below? 2. Can the priority of a farmer to the use of water for agricultural purposes be transferred by sale to a city for city purposes so that it may succeed to the rights of the original appropriator? 3. To the extent the use made by the city is purely for domestic purposes, has it the right, without compensation, to take waters theretofore appropriated for agricultural purposes?

That an affirmative answer must be given to the first of the above questions seems obvious. A negative answer would wipe out the doctrine of priorities, upon which our elaborate system is based, — a system generally recognized as among the best yet devised, and upon which vast property rights have been built.

The fundamental principle of this system is, that priority in point of time gives superiority of right among appropriators for like beneficial purposes. To now say that an appropriator from the main stream is subject to subsequent appropriation from its tributaries would be the overthrow of the entire doctrine. All large streams are dependent upon tributaries for a supply of water. To cut off the water from such tributaries would be to destroy the capacity of the stream, to the injury of those below. It would result in ruinous and useless expenditures of money in a race between rival claimants in the extension of ditches towards the source of water supply, and reward success at the expense of the rights of prior appropriators.

But counsel say: "The waters of the Ruxton lose their identity upon reaching the Fountain. For all purposes to the appropriator, below the point confluence, Ruxton Creek does not exist; it cannot be identified. That being so, how can it be said by the appropriator upon the Fountain Creek that the appropriator upon Ruxton Creek has taken his water?" It is shown by the stipulation that Ruxton Creek is fed and formed by a number of streams coming together above the place of intake of defendant's pipe line. Now, if plaintiff in error be correct, and the appropriator of water from a stream be held to have no claim upon the water of the tributaries of that stream, then defendant's water supply is liable to be cut off by settlers above at any time, — a conclusion so manifestly unjust that it must be discarded. It is not a question of identity, as counsel seem to suppose, but one of supply. It is of no consequence to the appropriator below whether the water

supplied to him comes from Ruxton Creek or from some other tributary to the Fountain; this is entirely immaterial, so long as his supply is adequate. When it is lessened by junior appropriators to his injury, he has cause to complain, no matter whether the diminution results from such appropriators taking the water direct from the Fountain, or from some of its tributaries before it reaches the main stream.

2. Upon the next proposition, plaintiff in error insists that a water right cannot be transferred by sale separate from the land. The question thus raised is one of first impression in this court. Its importance is apparent. In *Fuller v. Swan River etc. Min. Co.*, 12 Col. 12, a nearer approach was made to its consideration than in any other decided case. It was there held that one who has the right by appropriation to divert the waters of a stream may change the place of diversion and also the place of use. This disposes of plaintiff's contention that the water is only appropriated for a particular tract of land, and that the appropriation will not hold for any other; for although the decision is based upon diversion for mining purposes, no reason is perceived why the rule in reference to appropriations for agricultural uses should not be the same, the requirement in all cases being that the water diverted from the stream shall be applied to a beneficial use.

After reviewing the authorities, the court said: "It seems to be well settled by these decisions that a prior appropriator of water from a stream may change the point of diversion and the place of use without affecting his right of priority, and all the cases reviewed, except the case of *Davis v. Gale*, 32 Cal. 27, 91 Am. Dec. 554, make the right to make such change dependent upon the condition that the change shall not injuriously affect others. We think that the rule announced in *Kidd v. Laird*, 15 Cal. 162, 76 Am. Dec. 472, 'that, in the absence of injurious consequences to others, any change which the party chooses to make is legal and proper,' is the only rule which, under the rights of the prior appropriator, can be fully exercised, and his rights, and the rights of all other persons fully protected. The right to change, so limited, includes the point of diversion, and place and character of use."

The rule as thus stated seems to be fair to all parties concerned. If A is the owner of 160 acres of land, with a water right for only 80 acres, it may be of great benefit to him to change the place of use as the soil upon a portion of the tract becomes exhausted or impoverished by the

raising of crops. To deny the right to change the place of use under such circumstances would result in injury to the prior appropriator, with no corresponding benefit to others. The wisdom of the rule in *Fuller v. Swan River etc. Min. Co.*, 12 Col. 12, is apparent when applied in such a case. And no reason is perceived why, if the place of use may be changed to a tract adjoining the one in connection with which the priority came into existence, it may not as well be changed to a piece of land at a greater distance. The principle permitting the first change to be made being established, the exercise of the right cannot be made to depend upon the *locus* of the use, provided the rights of others are not injuriously affected by the change. The authority for changing the place of use from one part of a quarter-section of land to another place upon the same quarter-section will permit the purchase of land elsewhere, and utilizing the water in its cultivation. Thus if the owner of land near Ruxton Creek with a water right therefor may purchase land farther away from the source of water supply, say at Colorado Springs, and utilize his appropriation for such land, in turn he may sell and convey this land with such water rights as he may have therefor. And there is nothing to prevent the said city from purchasing both, and thereafter changing the place of use the same as any other appropriator. But why force the city to buy the land if it only needs the water?

An examination of the case in 12 Colorado will show the conclusion there announced to be well supported, upon principle and authority. And it being thereby established that the place of use may be changed, it logically follows that the right to the use of the water for irrigation is a right not so inseparately connected with the land that it may not be separated therefrom. The right has been treated and held as a property right in numerous cases. In *Kidd v. Laird*, 15 Cal. 161, 76 Am. Dec. 472, it is said: "This court has never departed from the doctrine that running water, so long as it continues to flow in its natural course, is not, and cannot be made, the subject of private ownership. A right may be acquired to its use which will be regarded and protected as property; but it has been distinctly declared in several cases that this right carries with it no specific property in the water itself." Mr. Gould, in his work on water rights, at section 234, says: "The right to water acquired by priority is the subject of property, and may be sold and conveyed."

"The exclusive right to divert and use the water of a stream, as well as the ditch or other structure through which the diversion is effected, may be transferred and conveyed, like other property or rights analogous to property": Pomeroy on Riparian Rights, par. 58.

The authorities seem to concur in the conclusion that the priority to the use of water is a property right. To limit its transfer as contended by appellee would in many instances destroy much of its value. It may happen that the soil for which the original appropriation was made has been washed away and lost to the owner, as the result of a freshet or otherwise. To say, under such circumstances, that he could not sell the water right to be used upon other land would be to deprive him of all benefits from such right. We grant that the water itself is the property of the public; its use, however, is subject to appropriation, and in this case it is conceded that the owner has the paramount right to such use. In our opinion, this right may be transferred by sale, so long as the rights of others, as in this case, are not injuriously affected thereby. If the priority to the use of water for agricultural purposes is a right of property, then the right to sell it is as essential and sacred as the right to possess and use. Blackstone says: "The third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions without any control or diminution save only by the laws of the land": Bla. Com., b. 1, p. 138.

What difference can it make to others whether the owner of the priority in this case uses it upon his own land, or sells it to others to be used upon other lands? There is no claim of waste occurring between the present points of diversion and the place where the city is to take the water. Where a material waste results from the change, a new feature is introduced, which need not be considered here. In chapter 5 of Angell on Watercourses, a number of instances are cited where, at common law, water rights were declared to be the subject of sale, and although with us such rights are acquired by appropriation, rather than by grant or prescription, as at common law, this certainly cannot affect the right of alienation. In *Hurd v. Curtis*, 7 Met. 94, several owners of mill privileges had apportioned the water among themselves by a written agreement. By the terms of this instrument one W., the owner of a fulling-mill, was entitled to a

certain portion of the water for the use of his mill, "or for other machinery requiring equal power," and it was held that the water right was not inseparably connected with the building or site at which the water was then used, but that it might be used elsewhere.

In *De Witt v. Harvey*, 4 Gray, 486, a deed had been given of land bordering on a canal supplying mills, "with the privilege of crossing to and from and around the same, and of erecting and using tenter-bars in some convenient place near the same, with the privilege, also, of drawing water from said canal at all times when it may be done without injury to the said mills, sufficient for the purpose of a fulling-mill and shearing-machine, but for no other purposes whatever." And it was held that the right to use the water for a fulling-mill and shearing-machine is not made apparent to the land grant, and also that such right was not extinguished by the dam being subsequently taken down by the owners of water-power at that spot, and rebuilt in such a manner as to overflow the land granted by the deed; the court being of opinion that the rights of water were not appurtenant to the particular parcel of land granted, but that the owner might use the water at any place or in any manner, so long as the rights of others were not thereby impaired. When, therefore, the land became submerged, it was held that the right of the owner to use the water at any other mill, or upon any other parcel of land situated on the same dam, should be sustained.

There is no controversy in the present case in reference to the mode and manner in which the right to the water may be conveyed, the contention extending further back, the claim being that the right cannot be conveyed at all, except with the land. The claim is not well founded. As we have seen, the right is the subject of property, and may be transferred accordingly, the sole limitation being that the rights of others shall not be injuriously affected by such transfer.

3. Has the city the right to take the water without compensation? This right is claimed under section 6 of article 16 of our constitution. The section relied upon and the preceding section read as follows:—

"Sec. 5. The water of every natural stream not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

"Sec. 6. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

As the rights desired by the city accrued prior to the adoption of these constitutional provisions, a well-understood rule of construction, applicable alike to constitutions and statutes, exempts this case from the operation of the constitution in this respect. That instrument operates prospectively only, unless a contrary intention clearly appears from the words employed: Cooley's Constitutional Limitations, secs. 62, 63. No such intention appears in the provision quoted; in fact, the use of the words "not heretofore appropriated," in section 5, and "unappropriated waters," in section 6, clearly indicate an intention to limit the application of these provisions to the future. If, as urged by plaintiff in error, these provisions were intended to confer upon cities, towns, or individuals the right to take without compensation, for domestic use, water appropriated for agricultural and other purposes before its adoption, they would fall under the ban of the fourteenth amendment to the federal constitution, which provides that no person shall be "deprived of life, liberty, or property without due process of law." As we have already seen, a priority to the use of water is a property right.

The construction contended for would also bring the provisions quoted from the state constitution in conflict with several other provisions of that instrument, notably section 3 of the bill of rights, in which it is declared "that all persons have certain rights, among which may be reckoned that of acquiring, possessing, and protecting property," and section 15, which provides that "private property shall not be taken or damaged for public or private use without just compensation," and section 25, which contains the same language as that just quoted from the national constitution. And for this reason it should be rejected, it being equally open to a construction that will at once harmonize and make effective the entire provisions of the instrument in relation to the subject.

Our conclusion, therefore, is, that the constitutional provisions relied upon were not intended to affect, and do not affect, prior vested rights, but that all owners of such rights are entitled to compensation therefor before the same can be taken or injuriously affected. This is in accordance with the express terms of the statute under which the city is attempting to acquire a supply of water as the same was enacted at the first session of the legislature convened after the adoption of the constitution.

“They shall have the right and privilege of taking water in sufficient quantity, for the purpose hereinbefore mentioned, from any stream, creek, gulch, or spring in the state; provided, that if the taking of water in such quantity shall materially interfere with or impair the vested rights of any person or persons or corporation heretofore acquired, residing upon such creek, gulch, or stream, or doing any milling or manufacturing business thereon, they shall first obtain the consent of such person or persons or corporation, or acquire the right of domain, by condemnation as prescribed by the constitution and laws upon the subject, and make full compensation or satisfaction for all the damages thereby occasioned to such person or persons or corporation”: Gen. Stats. 1883, p. 974, sec. 73.

The statute is instructive as a contemporaneous legislative interpretation of the constitution, aside from the argument to be based upon the fact of the city being purely a creature of statute, and can therefore only exercise the powers conferred in the manner provided by the legislative department.

From anything that we have predicated upon the fact that the water rights desired by the city antedate the adoption of our constitution, we are not to be understood as intimating that if the contrary had been the fact, the rule requiring compensation to be made when such rights are taken for a higher use would be different. The determination of this question is not involved in this case.

The right of a tax-payer to bring an action of this nature has not been raised or considered; for, accepting the agreement of counsel that he may do so, we are of the opinion, for the reasons given, that the facts relied upon do not constitute a cause of action. The judgment of the district court denying relief must therefore be affirmed.

appropriation: *Reno etc. Works v. Stevenson*, 20 Nev. 269; 19 Am. St. Rep. 364, and note; *Jones v. Adams*, 19 Nev. 78; 3 Am. St. Rep. 788, and note. An appropriator of the water of a stream for irrigation acquires a prior right against a riparian proprietor who obtains his patent for his land after the appropriation, but before the enactment of the amendment of July 9, 1870, to the act of Congress of July 26, 1866, requiring patents to public lands to be subject to any vested or accrued water rights: *Hammond v. Rose*, 11 Col. 524; 7 Am. St. Rep. 258, and note. The constitution of Colorado recognizes rights to waters acquired by priority of appropriation: *Wheeler v. Northern etc. Irr. Co.*, 10 Col. 582; 3 Am. St. Rep. 603, and note. See extended note to *Heath v. Williams*, 43 Am. Dec. 280. The doctrine of prior appropriation applies to the public lands of the United States: *Curtis v. La Grande etc. Co.*, 20 Or. 34; *Thorpe v. Tenem Ditch Co.*, 1 Wash. 566. Priorities of right may be claimed by the consumers of water through the same ditch: *Farmers' etc. Co. v. Southworth*, 13 Col. 111. Where a patent is issued to a homestead settler upon public land, it relates back to the settlement, and cuts off the right to divert any stream of water running through such homestead: *Faull v. Cooke*, 19 Or. 455; 20 Am. St. Rep. 836. The use of water upon land to which it is appurtenant, by a trespasser, will not give him any rights therein which he can convey: *Alta etc. Co. v. Hancock*, 85 Cal. 219; 20 Am. St. Rep. 217, and note; *Ellis v. Pomeroy etc. Co.*, 1 Wash. 572. A subsequent appropriator cannot divert water from the ditch of a prior appropriator: *Geddis v. Parrish*, 1 Wash. 587; *Roberts v. Arthur*, 15 Col. 456. See case of *Ball v. Kehl*, 87 Cal. 505.

WATERCOURSES — APPROPRIATION — CHANGING POINT OF DIVERSION. — One riparian owner upon a navigable stream, having no title to the water, cannot maintain an action against another for its diversion: *Fulmer v. Williams*, 122 Pa. St. 191; 9 Am. St. Rep. 88, and note. A person entitled to divert a given quantity of water may take the same at any point of the stream, and may change the point of diversion at pleasure, if he does not thereby injure the rights of others: *Kidd v. Laird*, 15 Cal. 161; 76 Am. Dec. 472, and note; *Lobdell v. Simpson*, 2 Nev. 274; 90 Am. Dec. 537, and note. See extended note to *Davis v. Getchell*, 50 Me. 602; 79 Am. Dec. 636; *Mathewson v. Hoffman*, 77 Mich. 421; *Paige v. Rocky Ford etc. Co.*, 83 Cal. 84.

WATERCOURSES — SALE OF WATER RIGHTS. — Riparian rights are an appurtenance to the land. They may be segregated by grant or condemnation, or extinguished by prescription: *Alta etc. Co. v. Hancock*, 85 Cal. 219; *Ellis v. Pomeroy etc. Co.*, 1 Wash. 572. Where proprietors of a ditch have transferred their right to control it to a corporation for their use, the corporation thereby becomes the trustee of an express trust, and may sue to enforce the rights of such proprietors: *Thorpe v. Tenem Ditch Co.*, 1 Wash. 566.

CONSTITUTIONAL LAW — RETROSPECTIVE LAW. — An amendment to the constitution of a state authorizing its legislature to enact a law cannot impart validity to a law of the same character previously enacted, which when so enacted was unconstitutional: *State v. Tuffy*, 20 Nev. 427; 19 Am. St. Rep. 374, and note; *McCarty v. State*, 1 Wash. 377.

CARPENTER v. INNES.

[16 COLORADO, 165.]

REPLEVIN AGAINST OFFICER. — Replevin will lie in any state court of competent jurisdiction against an officer, in favor of the owner of goods seized by such officer, upon a writ against a third person, in an attachment suit pending in any other of the courts of the state.

REPLEVIN — PROCESS, WHEN NO PROTECTION TO OFFICER. — Where the evidence in an action of replevin against an officer shows that he has taken property which did not belong to the party against whom the process ran, the taking is wrongful, and the process affords him no protection.

Bucklin, Staley, and Safley, and Byron Millett, for the plaintiff in error.

Richard A. Thompson, for the defendant in error.

BISSELL, C. This was an action begun in June, 1885, in the county court of Mesa County, to recover of the defendant, Innes, the possession of certain personal property said to have been wrongfully taken by him and withheld from the plaintiff, with damages for the taking and detention.

The defense interposed was a justification by the defendant under a process of attachment issued out of the county court of Arapahoe County, in a suit by W. A. Hover & Co. against one J. C. Kennedy. The goods in controversy were in the possession of the plaintiff, Carpenter, but had been seized by the sheriff under the attachment issued against defendant, Kennedy, in the other suit.

Upon the trial in the county court, the issues were found for the defendant sheriff, and from that judgment an appeal was taken to the district court. When the case came on for trial in that court, a stipulation was filed by the attorneys for the respective parties, setting up the doubt that existed as to the jurisdiction of the court in an action of replevin brought against an officer who had taken goods under a writ issued against a third person, and stipulating that the sole question which should be tried at that time should be the one relating to the jurisdiction. The stipulation reserved all other questions for ultimate determination. Under this stipulation the hearing was had, and testimony was introduced which established the pendency of the other suit, the seizure by the sheriff of the goods claimed by the plaintiff, and evidence was tendered to show the plaintiff's ownership and title. The record was permitted to be offered, but proof of title was rejected.

The decision was rendered upon the hypothesis that the property was *in custodia legis*, and followed what was erroneously supposed to be the rule laid down in *Parks v. Wilcox*, 6 Col. 489.

Since this decision by the district court, however, the precise question involved has been adjudicated by this tribunal. The rule has been established, that replevin will lie in any state court of competent jurisdiction, in favor of one who is the owner of goods which had been seized by the sheriff, or any other officer, upon a writ against a third person, where the suit in which the writ issued has been brought in any other of the courts of the state. The decision proceeds upon the principle that the taking by the officer is without authority, and wrongful, and that the process will afford him no justification if the proof establishes that he had taken property which did not belong to the person against whom the process runs: *Wilde v. Rawles*, 13 Col. 583.

Under this authority, it is evident that the decision of the court, holding that it was without jurisdiction, was erroneous, and that the case must be reversed for further proceedings.

REED, C., and RICHMOND, C., concur.

Per CURIAM. For the reasons stated in the foregoing opinion, the judgment is reversed, and the cause remanded.

Replevin against Officer.*

OFFICER, REPLEVIN AGAINST, BY STRANGER TO WRIT. — This topic has received considerable attention and discussion in the note to *Kellogg v. Churchill*, 9 Am. Dec. 105-107, where all of the early and many of the late cases are collected and cited. The general rule is there deduced, that a stranger to a writ of execution may in all cases maintain replevin against the officer to recover his goods levied upon as the goods of the execution debtor, no matter from whose possession the goods were taken. Some of the earlier cases, however, noted a distinction maintaining that if the goods levied upon were taken from the possession of the execution defendant, they were not subject to replevin by a stranger to the writ claiming them as his own. This distinction, it seems, was never applied in cases of attached property, and it has ceased to exist, either by virtue of statute or adjudication, in any case, whether of attachment, execution, or mesne or final process, except in

*REFERENCE TO MONOGRAPHIC NOTES.

Officers, justification of, by process: 21 Am. Dec. 190-209.

Officers, liability of, for acting under an unconstitutional statute: 64 Am. Dec. 51-55.

Officers, liability of, for loss of moneys while in their custody: 67 Am. Dec. 365-373.

Officers, liability of, for misconduct in execution of process: 46 Am. Dec. 513-517.

Officers, liability of sureties on successive bonds of: 10 Am. St. Rep. 843-860.

Officers, liability of, to action by private individuals for non-performance of public duty: 90 Am. Dec. 726-732; 83 Am. Dec. 563-566.

Officers, military, liability of, to civil action: 42 Am. Dec. 54-58.

one or two of the states of the Union. Thus the rule is still maintained in New Hampshire, that replevin does not lie against an officer by a stranger to the writ to recover goods claimed by him as his own, but taken on a valid execution as the property of the judgment debtor; and this, whether the goods were taken from the possession of the judgment debtor, or otherwise: *Kittredge v. Holt*, 55 N. H. 621.

The general rule may now be stated to be, that if an officer, either by mistake or design, levies on goods not the property of the defendant named in his writ of execution or attachment, or if the property, for any reason, is not liable to be taken on the writ, replevin will lie against him, at the instance of the injured party, no matter from whose possession the goods were so taken. This rule is sustained by an unbroken line of authority in nearly every state of the Union, with the notable exception already mentioned.

The rule in cases involving the levy of an execution may be thus broadly stated: Replevin for personal property may be maintained by the owner against an officer taking the same under an execution against a third person: *Jones v. Ward*, 77 N. C. 337; *Churchill v. Lee*, 77 N. C. 341; *Raiford v. Hyde*, 36 Ga. 93; *Brown v. Bissett*, 21 N. J. L. 267; *Tison v. Bowden*, 8 Fla. 70; 71 Am. Dec. 101; *Stone v. Bird*, 16 Kan. 488; *Hilton v. Osgood*, 49 Conn. 110; *Gimble v. Ackley*, 12 Iowa, 27; *Shea v. Watkins*, 12 Iowa, 605; *Smith v. Montgomery*, 5 Iowa, 370; *Tuttle v. Robinson*, 78 Ill. 332; *Yorborough v. Harper*, 25 Miss. 112; *Saunders v. Jordan*, 54 Miss. 428; *Swain v. Alcorn*, 50 Miss. 320; *State v. Booker*, 61 Miss. 16; *Hadley v. Hadley*, 82 Ind. 75; *Louthain v. Fitzer*, 78 Ind. 449; *Whitney v. Swensen*, 43 Minn. 337; *Bouldin v. Alexander*, 7 T. B. Mon. 424; *Schars v. Barnd*, 27 Neb. 94; *Williams v. Eikenberry*, 25 Neb. 721; 13 Am. St. Rep. 517; *Otis v. Williams*, 70 N. Y. 208; *Bullis v. Montgomery*, 50 N. Y. 352; *Wyatt v. Freeman*, 4 Col. 14. Replevin may be maintained for goods seized by a sheriff on an execution against their former owner, on proof that plaintiff had possession of them, coupled with an interest, and notwithstanding the legal title and right of possession may have been in a third person: *Johnson v. Carnley*, 10 N. Y. 570; 61 Am. Dec. 762. So replevin lies against an officer by a person not having the actual possession of the goods when taken, provided he has at the time the general property and a right of immediate possession, and is a stranger to the execution: *Chinn v. Russell*, 2 Blackf. 172. If a sheriff levies an execution upon the goods of another than the execution defendant, the goods being present and in the control of the latter, where they are allowed to remain after the levy upon his delivery bond without surety, the owner may maintain replevin for them against the sheriff: *Hadley v. Hadley*, 82 Ind. 95.

In cases where the property attached is owned by a stranger to the writ, the same rule prevails as in like cases of levy under execution, and may be stated to be, that property which has been attached can be taken out of the hands of the attaching officer by a writ of replevin sued out by a third person, a stranger to the writ, who claims to be entitled to the property and the possession thereof: *Hopkins v. Drake*, 44 Miss. 619; *Wheeler v. Dixon*, 51 Miss. 559; *Brown v. Chickopee Falls Co.*, 16 Conn. 87; *Angell v. Keith*, 24 Vt. 371; *Willis v. Reinhardt*, 52 Ark. 128; *Foss v. Stewart*, 14 Me. 312; *Heidenheimer v. Sides*, 67 Tex. 32; *Anchor Milling Co. v. Walsh*, 20 Mo. App. 107; *Wangler v. Franklin*, 70 Mo. 659; *Samuel v. Agnew*, 80 Ill. 553; *Caldwell v. Arnold*, 8 Minn. 265. The rule is thus well stated in *Gross v. Bogard*, 18 Kan. 288: Replevin can be maintained against an officer for the recovery of personal property which he holds by virtue of a previously existing order of delivery, provided the plaintiff in replevin was not a party to the first action or first

order of delivery. The same rule prevails as to property held under an order of delivery as to that held under an execution, attachment, or any other mesne or final process; and the person against whom the writ runs is the only one who may not assert his rights to the property in an action of replevin against the officer. So replevin is the proper remedy when property has been seized by an officer, and is being held under a writ, and is about to be sold, when an injunction will not lie to restrain the officer by one who claims to be the owner of the property levied upon: *Richards v. Kirkpatrick*, 53 Cal. 433. The cases all agree that the owner of personal property seized under an attachment or execution against the property of another may maintain replevin against the officer having it in possession, without making demand on him previously to the institution of the action, if the property was taken from his possession: *Stone v. Bird*, 16 Kan. 488; *Shea v. Watkins*, 12 Iowa, 605; *Ledley v. Hays*, 1 Cal. 160; *Harpending v. Meyer*, 55 Cal. 560; *Dickson v. Randal*, 19 Kan. 212. Thus a married woman who purchases personal property from her husband or any other person in good faith, and for a good and sufficient consideration, is the owner of the property, and may maintain in her own name an action of replevin therefor against an officer who levies on the same under an execution to satisfy her husband's debt without first making demand of the officer therefor: *Dickson v. Randal*, 19 Kan. 212. So where property is in the possession of an agent of the owner, and is levied on by an officer under an execution against a third party, and is then turned over by the officer to such agent, to hold as his custodian, the owner need not make demand before bringing replevin against such officer and custodian: *Tuttle v. Robinson*, 78 Ill. 332. Where the property is found by the officer in the actual custody of the party named in the execution, the levy thereon gives the officer a lawful possession, and a demand is then a necessary prerequisite to a suit in replevin against the officer; but when the property is found in the custody of a stranger to the writ, the officer's possession under his levy is wrongful, and no demand is then necessary: *Stone v. O'Brien*, 7 Col. 458; *Tuttle v. Robinson*, 78 Ill. 332.

An officer who in good faith levies on the property of a stranger to the writ, honestly believing it to belong to the defendant named therein, is not liable in exemplary damages to the owner of the property wrongfully seized: *Heidenheimer v. Sides*, 67 Tex. 32. The measure of damages against the officer in the action of replevin brought against him by the owner of the goods in such case is the actual damages caused by their seizure and detention, under the circumstances of the case: *Schars v. Barnd*, 27 Neb. 94; *Anchor Milling Co. v. Walsh*, 20 Mo. App. 107.

It seems that when personal property is jointly owned by several different persons, replevin will not lie by one to recover goods levied upon as belonging to another of the owners. Thus replevin cannot be maintained by one copartner for partnership goods, in the hands of an officer under an attachment against another copartner's interest therein: *Hucker v. Johnson*, 66 Me. 21; and it has been decided that replevin will not lie against an officer for specific personal property in his custody under a lawful writ commanding him to levy on that identical property: *Griffith v. Smith*, 22 Wis. 646; 99 Am. Dec. 90.

The owner of personal property held by an officer under a writ of replevin in another case, to which the owner was not a party, may maintain cross-replevin against the officer for its possession: *Davis v. Gambert*, 57 Iowa, 239; *Reiley v. Haynes*, 38 Kan. 259; 5 Am. St. Rep. 737.

In Michigan, at least, replevin can be maintained by a mortgagee against

an officer attaching the goods as the property of the mortgagor, while in the latter's possession, after demand upon the officer and a refusal by him to surrender the goods: *Wood v. Weimar*, 104 U. S. 786.

A receiver of an insolvent national bank acquires no right to property in the custody of the bank which it does not own as against the owner thereof, and he may maintain replevin therefor in the state court: *Corn Exchange Bank v. Blye*, 101 N. Y. 303. So replevin may be maintained by the owner against a receiver seizing property to which the debtor never had title: *Hills v. Parker*, 111 Mass. 508; 15 Am. Rep. 63.

The rule is well settled that replevin against an officer for the wrongful seizure of plaintiff's goods under an attachment or execution against another can be brought in any court of competent or concurrent jurisdiction within the state, and need not be brought in the court out of which the writ issued: *Johnson v. Jones*, 16 Col. 138; *Wilde v. Rawles*, 13 Col. 583; *Samuel v. Agnew*, 80 Ill. 553; *Ramsden v. Wilson*, 49 Iowa, 211; *Ross v. Hawthorne*, 55 Miss. 551. And if a party claiming goods seized under a writ against another issued out of one federal court was not a party to that suit, he may maintain replevin in another federal court against the officer making the levy: *Seaton v. Higgins*, 50 Iowa, 305. It would seem to be well established by the overwhelming weight of authority, that, notwithstanding the decision in *Freeman v. Howe*, 24 How. 451, to the contrary, replevin will lie in a state court against a United States marshal to recover goods seized by him on attachment, or execution, or on mesne or final process issued from a United States court, when the goods belong to some other person than the defendant named in the writ. The basis for the rule is the fact that property thus unlawfully taken and detained by such officer is not in the custody of the law, no matter from what court his process issued: *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219; *Ward v. Henry*, 19 Wis. 76; 88 Am. Dec. 672, and note 675; *Bruen v. Ogden*, 11 N. J. L. 370; 20 Am. Dec. 593; *Davidson v. Waliron*, 31 Ill. 120; 83 Am. Dec. 206; *Howe v. Freeman*, 14 Gray, 566; *Carew v. Matthews*, 41 Mich. 576; *Cooper v. Tompkins*, 43 Mich. 406; *Heyman v. Correll*, 44 Mich. 332; 38 Am. Rep. 272. The broad rule announced in *Freeman v. Howe*, 24 How. 450, reversing *Howe v. Freeman*, 14 Gray, 566, that replevin would in no case lie in a state court against a United States officer who holds property by virtue of a levy made under process issued by a federal court, has in no case, so far as we have been able to discover, been followed, when the party claiming ownership of the goods as against the officer, was a stranger to the writ under which they were seized. This rule has, however, been followed by some state courts, under remonstrance, when replevin was sought to be maintained by the defendant in the action in which the process issued, as in *Lewis v. Buck*, 7 Minn. 104; 82 Am. Dec. 73; *Booth v. Albenan*, 16 Wis. 460; 84 Am. Dec. 711.

ROLLINS v. McHATTON.

[16 COLORADO, 203.]

INSURANCE — BENEFIT SOCIETY — CHANGE OF BENEFICIARY. — The beneficiary named in an insurance certificate issued by a benefit society may be changed by the member, when power to make the change is conferred by the charter and by-laws, and also recognized in the contract of insurance.

INSURANCE — BENEFIT SOCIETY — DEATH OF BENEFICIARY BEFORE ASSURED. — Where the beneficiary named in an insurance certificate issued by a mutual benefit society dies before the insured member, no interest in the fund vests in the beneficiary, and her surviving son inherits no part of the fund by virtue of his relationship.

INSURANCE — BENEFIT SOCIETY — CHANGE OF BENEFICIARY. — Where a certificate of membership and insurance issued by a benefit society specifies the mode in which a change of beneficiary may be made, such mode must be strictly followed, to be valid, and when the certificate specifies that such change is to be made by an entry thereof on the records of the society, a mere delivery of the certificate by the assured, accompanied with oral declarations in relation thereto, will not constitute such a compliance as will work a change of beneficiary.

INSURANCE — BENEFIT SOCIETY — CHANGE OF BENEFICIARY — EQUITABLE JURISDICTION. — Where the insured member in a mutual benefit society has in good faith attempted to comply with the mode prescribed for changing his beneficiary, but, owing to circumstances beyond his control, the change is not entirely consummated at the time of his death, equity will sometimes treat the substitution as complete.

INSURANCE — BENEFIT SOCIETY — INSURED HAS NO INTEREST IN FUND. — The insured member in a mutual benefit society has no interest in the fund. He simply has a power of appointment, which, if not exercised, becomes inoperative, and in no event does the insurance money become assets of the insured's estate.

APPEAL from a judgment of distribution. Charles K. McHatton held a certificate of membership and insurance in the Knights of Pythias, payable to Mattie E., his wife. She died before her husband. After her death, the certificate passed from her custody to that of her mother. Said McHatton subsequently procured it and delivered it to one R. P. Rollins, guardian of the minor son of himself and said Mattie E., with directions for said Rollins to hold it for the benefit of said son. No indorsement showing a change of beneficiary upon the records of the society, as required by the certificate, was ever made by McHatton. He paid his assessments and dues, and was a member in good standing at the time of his death. The certificate remained in the possession of Rollins until deposited in court subsequently to the death of McHatton, who had, after the delivery of the certificate to Rollins, married the appellee, Frances A. McHatton. The court ordered the

insurance money to be equally divided between said Frances A. and the said son of McHatton. Rollins, as guardian, appealed.

E. Caypless, and Keeler and Sales, for the appellant.

S. T. Horn and T. E. Barnum, for the appellee.

HELM, C. J. No doubt exists as to the authority of McHatton to change the beneficiary named in the insurance certificate under consideration. Aside from the fact that this power is conferred upon the member by the charters or by-laws of benefit societies, the present contract contains a provision expressly authorizing the same. It declares that upon the death of the assured the sum mentioned will be paid "to Mattie E., wife, as directed by the said brother in his application, or to such person or persons as he may subsequently direct by change of beneficiary entered upon the record of the supreme secretary of the endowment rank."

Appellant asserts that the entire amount called for by the certificate belongs to the son, and that appellee, the surviving widow, takes nothing.

Mattie E., the beneficiary named in the certificate, having died before the assured, no interest in the fund provided for ever vested in her. Thomas S., her surviving son and heir, could therefore have inherited no part thereof by virtue of such relationship.

But appellant confidently relies upon the proposition that the delivery of the certificate to him for the use of the son constituted a sufficient change of beneficiary to vest in the son, immediately upon the father's decease, a right to the money. Upon this contention the principal controversy rests. Were the certificate silent as to the manner in which such substitutions are to be made, there might be room for appellant's contention. But turning to the extract above given, we discover that other persons than the one originally named can receive the bequest only upon direction of the assured "by change of beneficiary entered upon the record of the supreme secretary." This provision thus plainly declares how another person may be substituted in place of the one first designated. The language used is too plain to be misunderstood, and we are not at liberty to supply new words or to ignore the clear import of those employed by the contracting parties. The intent to permit a change of beneficiary at the will of the assured is no more plainly declared by the preceding clause

than is the manner of executing that intent by the expression under consideration. The resolution to substitute can be enforced in but one way, viz., "by change of beneficiary entered upon the record," etc. It will not do to say that the entry upon the record is directory merely, or that it is of no special importance. This entry is an essential part of the substitution, and the change is incomplete until it is made: *Bacon on Benefit Societies*, sec. 307; *Holland v. Taylor*, 111 Ind. 121; *Daniels v. Pratt*, 143 Mass. 216; *National Mut. Aid Soc. v. Lupold*, 101 Pa. St. 111; *Stephenson v. Stephenson*, 64 Iowa, 534; *Coleman v. Knights of Honor*, 18 Mo. App. 189; *Kentucky etc. Ins. Co. v. Miller*, 13 Bush, 489; *Eastman v. Provident etc. Ass'n*, 62 N. H. 555; *Hellenberg v. District etc. of B. B.*, 94 N. Y. 580.

The delivery of the certificate to appellant by McHatton was no compliance with the mode prescribed for effectuating a change of beneficiary. While it may be indicative of the intent of McHatton at the time, it was not the method agreed upon for the declaration of that intent.

We cannot accept the view that this provision was inserted in the certificate exclusively for the protection of the association. It is doubtless a matter of importance to such societies that their books show all changes in this respect. But it is more important to the assured that some record of the kind be kept, in order that his wishes in the premises may not, after his death, be defeated. And obviously the beneficiary is profoundly interested in having such definite and reliable record evidence of his ownership. It would be a dangerous precedent were we to hold that the designation of the change of beneficiary by entry upon the books of the company is not imperative. Disregard of the prescribed mode of substitution would tend to frustrate the wise and benevolent object to which these societies owe their existence. And if such changes could be made simply by delivery of the certificate, accompanied with oral declarations, any relative or dependent who might become possessed of the instrument would have it in his power to nullify the purpose of the deceased donor and deprive the true donee of the bequest. If McHatton desired to have his son receive all of the insurance fund, notwithstanding his remarriage, it was only necessary for him to comply with the plain language of the certificate. His failure in this regard, coupled with the decease of the beneficiary named, left the fund without any designated owner.

Equity occasionally aids an attempted but uncompleted change of beneficiary. If the assured has done his part towards perfecting the substitution in accordance with the method prescribed, but, owing to circumstances over which he has no control, the change is not entirely consummated at the time of his death, equity will sometimes treat the substitution as complete: Bacon on Benefit Societies, secs. 309, 310, and cases cited. But it is an essential prerequisite to the interposition of equity that the assured has in good faith attempted to comply with the prescribed mode of substitution. McHatton made no effort to do this. It does not appear that he communicated, orally or in writing, to the secretary or to any other officer of the association, a desire to have the proceeds from the risk paid to his son, or that he otherwise sought to secure the proper entry in the association's books.

We are not called upon to consider what the result would have been had the society, upon McHatton's decease, refused payment, and asserted a right to the reversion: Bacon on Benefit Societies, sec. 243. For while it declined to give either of the claimants preference, it voluntarily deposited the money with the court to be awarded to them as equity and the law might direct. It is not a party to the present record, and no further notice will be taken of any possible interest it might have possessed.

Did the court below, under all the circumstances above detailed, err in refusing to award appellant, for the use of the son, the entire proceeds from the certificate?

The insured member of such societies has himself no interest in the fund; he possesses simply a power of appointment, which, if not exercised, becomes inoperative: *Hellenberg v. District etc. of B. B.*, 94 N. Y. 580; Bacon on Benefit Societies, sec. 243. It would seem to follow that the insurance money could not in any event become assets of the insured's estate: *Eastman v. Provident etc. Ass'n*, 62 N. H. 555; *Worley v. Northwestern etc. Ass'n*, 3 McCrary, 53. That it cannot be used for the payment of his debts is stipulated in the agreed statement of facts and declared by express legislative enactment: Mills's Ann. Stats., sec. 2246. The argument of counsel tends to show that the constitution adopted by the benefit association of which McHatton was a member designates how the fund shall be distributed among the assured's relatives in cases like the present, where, upon his death, there is no specified beneficiary. But since this constitutional provision is

not a part of the record before us, we cannot be guided by its direction.

It is unnecessary, however, to rest our decision upon either the statute of descents and distributions or the constitution of the association. Appellant, as guardian, recovered as much as would have belonged to the son were this constitution or statute applicable; and it is apparent from what we have said, that in the absence of some statute, by-law, or contract touching the subject, he is not entitled to more. The apportionment of the fund in question made by the district court is eminently fair, and cannot be disturbed at the instance of appellant.

The judgment is affirmed.

BENEFIT SOCIETIES — CHANGE OF BENEFICIARY. — As to the power of a member of a benefit society to change the beneficiary named in his certificate of membership, and the method of so doing, see *Block v. Valley Mut. Ins. Co.*, 52 Ark. 201; 20 Am. St. Rep. 166; note to *Bankers' etc. Ass'n v. Stapp*, 19 Am. St. Rep. 786-791. The change of beneficiary must be made according to the terms of the certificate of membership, or in the manner provided by the by-laws of the society: *Bowman v. Moore*, 87 Cal. 306; *Jinks v. Banner Lodge*, 139 Pa. St. 414.

BENEFIT SOCIETIES — DEATH OF BENEFICIARY BEFORE ASSURED. — Where the beneficiary named in a certificate issued by a benefit society died before the assured member, no interest vested in such beneficiary, and her surviving children could inherit no part of the fund by reason of their relationship: *Riley v. Riley*, 75 Wis. 464; *Given v. Wisconsin etc. Ins. Co.*, 71 Wis. 547. In *Milner v. Bowman*, 119 Ind. 449, where the beneficiaries, having a vested interest in a policy of insurance, died before the insured, who was their sole heir, it was decided that the latter took their interest by inheritance subject only to the claims of their creditors.

BENEFIT SOCIETY — CHANGE OF BENEFICIARY. — Where the member of a benefit society took all the necessary steps to make his mother his beneficiary, instead of his wife, and the society was ready to make the change, but by reason of fraud and collusion between the wife and an officer of the society the change was not formally effected prior to his death, the court held that the mother was entitled to the fund: *Marsh v. American Legion of Honor*, 149 Mass. 512.

BENEFIT SOCIETY — INTEREST OF THE INSURED IN THE FUND. — Upon the death of a member of a benefit society, the sum payable to the beneficiary named in the certificate cannot be considered as part of the deceased member's estate, nor recoverable by his administrator, as assets, unless such administrator happens to be the appointee: *Eastman v. Provident etc. Ass'n*, 62 N. H. 555.

WRAY v. CARPENTER.

[16 COLORADO, 271.]

AGENCY — REAL ESTATE AGENT, WHEN ENTITLED TO COMMISSIONS. —

Where a real estate agent has introduced to his principal an acceptable purchaser, willing and financially able to buy on the terms named by the principal, he is entitled to his commission, even though, through the fault of the principal, the sale does not actually take place, and when the sale is actually made the agent is entitled to his commission, even though it may afterwards transpire that such purchaser was unable to meet deferred payments as they became due.

JURY TRIAL — VERDICT — AFFIDAVIT OF JUROR TO IMPEACH. — Affidavits of jurors stating the theory or ground upon which they rendered their verdict will not be received for the purpose of impeaching it, except in special cases.

JURY TRIAL — INSTRUCTIONS — PRACTICE. — While, under the statute, the appellant need not note his exceptions to the instructions given, the record on appeal should nevertheless show that by proper objection he called the attention of the court to the alleged error, and thus gave opportunity for its correction at the time.

Long and Johnson, for the appellant.

Robert Given, for the appellee.

HELM, C. J. Appellee brought suit in the court below against appellant, and recovered one thousand dollars as commission for services rendered in procuring the sale of certain realty in Nebraska. The admitted facts show that appellant placed the property in the hands of appellee for sale at a certain figure, allowing him the sum recovered in case of success; that appellee found Corregen, the alleged purchaser, and introduced him to appellant; also, that negotiations between Corregen and appellant were carried on for a considerable period.

The rule contended for by appellant is undoubtedly correct, viz., that when, under circumstances such as are here presented, the agent has introduced to his principal an acceptable purchaser, willing and financially able to buy on the terms named by the principal, he is entitled to his commission, even though, through the fault of the principal, the sale does not actually take place: *Buckingham v. Harris*, 10 Col. 455, and cases cited.

But appellee did not, in the court below, base his recovery upon this rule of law; nor does he do so here. His contention is, that the sale was actually consummated. Appellant vigorously combats this contention. He asserts that the negotiations between him and Corregen entirely failed, because

Corregen proved to be financially irresponsible; and upon this controversy the case, so far as the evidence is concerned, will be determined. The proofs offered by appellee to establish the sale are not perfectly satisfactory. If sitting as a trial court without the aid of a jury, we might hesitate before finding affirmatively upon this question of fact; but the record is not wholly devoid of evidence to sustain the verdict returned. The testimony of both appellee and the witness Davis tends to show a completed sale to Corregen. It is strongly contradicted by appellant and Corregen; and there are circumstances corroborating to some extent the position of appellant in this regard. But we cannot say that the preponderance of evidence in appellant's favor is so great as to warrant our interference with the verdict of the jury, or the judgment pronounced thereon by the trial court, who also met the witnesses face to face.

If the sale to Corregen were actually completed, appellant must be held to have considered and favorably determined the latter's financial responsibility. And appellee was entitled to his commission, even though it may afterwards have transpired that Corregen was unable to meet deferred payments as they became due.

In support of his motion for a new trial, appellant offered to prove, by the affidavits of two or more jurors who tried the cause, "that the jury arrived at their verdict upon the theory that defendant, Wray, and R. A. Corregen concerted together to make the sale afterwards to J. C. Davis; that the jury believed that Corregen was wholly irresponsible, but that Carpenter had brought Corregen and Wray together, and that they afterwards made the sale." The court did not err in refusing to receive or consider these affidavits. As a general rule, affidavits of jurors stating the theory or ground upon which they rendered their verdict will not be received for the purpose of impeaching the same: *Thompson and Merriam on Juries*, sec. 440, and cases cited.

If the court erred in receiving evidence tending to show that subsequent to the commencement of the present suit appellant sold the premises in question to a third party (a point we do not determine), such error could not have injured him; for the effect of such evidence, if it were given any effect whatever, would be to corroborate appellant's theory that the sale to Corregen was never consummated. Nor do we perceive how the supposed aid of Corregen in

bringing about the alleged sale to Davis could make any difference. Being error without prejudice to appellant, the matter constitutes no ground for reversal.

The second instruction given stated correctly the law applicable to a completed sale. It was not intended to cover the rule authorizing a recovery of commissions where the agent has introduced a purchaser acceptable to the owner, and able and willing to buy upon the owner's terms, but by fault of the owner the sale is not consummated. This rule had already been fully and fairly stated in the preceding instruction. Besides, appellant is not in position to raise this question; for while the formality of noting his exception to the charge is done away with, the record should nevertheless show that by some proper objection he invited the trial court's attention to the alleged error, and thus gave an opportunity for its correction at the time.

All the matters urged in this court by counsel for appellant having been noticed, and no material error appearing, the judgment will be affirmed.

REAL ESTATE BROKER, WHEN ENTITLED TO COMMISSION. — A real estate agent has earned and is entitled to his commission when he has introduced to his principal one who is ready and willing to purchase the property, and financially able to buy it upon the terms named by the owner, although through the fault of the principal the sale is not actually consummated: *Hannan v. Moran*, 71 Mich. 261; *Burns v. Oliphant*, 78 Iowa, 456; *De Cordova v. Bahn*, 74 Tex. 643; *Ward v. Cobb*, 148 Mass. 518; 12 Am. St. Rep. 587, and note 590, 591; note to *Walker v. Osgood*, 93 Am. Dec. 175, 176; *Francis v. Baker*, 45 Minn. 83; *Wright v. Beach*, 82 Mich. 469; *Graves v. Bains*, 78 Tex. 92; *Blumenthal v. Goodall*, 89 Cal. 251.

NEW TRIAL. — ADMISSIBILITY OF JURORS' AFFIDAVITS TO IMPEACH THEIR VERDICT: See note to *Packard v. United States*, 48 Am. Dec. 376-379; note to *Crawford v. State*, 24 Am. Dec. 475-479; *Knowlton v. McMahon*, 13 Minn. 386; 97 Am. Dec. 236, and note.

TRAVELERS INSURANCE COMPANY v. MURRAY.

[16 COLORADO, 236.]

APPELLATE PRACTICE — PRESUMPTION AS TO OBJECTIONS TO EVIDENCE. —

Where a case is tried by the court without a jury, and testimony received, subject to a decision as to its competency on final hearing, and upon a motion to strike out, and no further challenge to the evidence is interposed, nor exception thereto reserved, an assignment of error based upon its admission will not be sustained on appeal. On the contrary, it will be presumed that the court, of its own motion, disregarded all improper evidence, and based its finding and judgment upon competent evidence only.

ACCIDENT INSURANCE — EVIDENCE OF VIGOR AND HABITS OF ASSURED. —

Where an action to recover on a policy of accident insurance for the death of the insured from hernia, inflicted while performing his duties as a railroad fireman after the policy issued, recovery is resisted on the ground that he was afflicted with chronic hernia long before the accident, evidence showing his habits, health, vigor, and ability to perform continued hard labor up to the time of the injury is competent to refute the defense set up.

ACCIDENT INSURANCE — EVIDENCE — WHAT REQUIRED TO ESTABLISH PRIOR

DISEASE OR INFIRMITY. — Where, in an action to recover on a policy of accident insurance for the death of the insured from hernia, inflicted while he was performing his duties as a railroad fireman after the policy issued, recovery is resisted on the ground that the deceased was afflicted with chronic hernia long before the accident, this defense must be established affirmatively by competent testimony, and it is not established by statements made by the deceased to his physician after the accident, to the effect that he did not know that he had ever been afflicted with hernia, although he had noticed a little lump there at times for about eight years back, especially when the evidence of other witnesses, who knew him intimately and for a long time, shows his continued good health, bodily vigor, and a condition absolutely incompatible with the supposed disability for a long time prior to the accident.

ACCIDENT INSURANCE — PROXIMATE CAUSE OF DEATH. — Where the insured under an accident policy is injured by an accident producing hernia, and dies after a necessary but unsuccessful surgical operation resulting in peritonitis, the accident, and not the operation, is the proximate cause of death.**ACCIDENT INSURANCE — EXCEPTIONS IN POLICY — CONSTRUCTION. —** Where a policy of accident insurance insures against death from bodily injury caused through external, violent, and accidental means, but excepts from liability for death from hernia, or medical or surgical treatment, the insurer is liable when the proximate cause of death is hernia inflicted by external, violent, and accidental means.**ACCIDENT INSURANCE — EXCEPTIONS IN POLICY SUSCEPTIBLE OF TWO CONSTRUCTIONS. —** Where an exception to a policy of accident insurance is capable of two meanings, the one is to be adopted which is most favorable to the insured.

ACTION on an accident insurance policy on the life of one M. J. McDonald. He, at the time of receiving the injury resulting in his death, was employed by a railroad company as a fireman, and while in the discharge of his duties received an injury causing rupture and inguinal hernia. An attempt was made to reduce it, and to keep the protruding bowels in place by ordinary and artificial means. This proved a failure, and the rupture becoming strangulated, a surgical operation was performed, in the hope of saving his life. This also failed, and he subsequently died. The insurer refused to pay the amount of the insurance, on the ground that the death resulted directly from the hernia and surgical operation, which were excepted against in the policy. The policy in suit ex-

cepted liability for death resulting directly or indirectly from medical or surgical treatment; or disease or bodily infirmity; hernia, fits, vertigo, or sleep-walking. In his written application for insurance, the deceased stated that "I have never had, nor am I subject to, fits, disorders of the brain, or any bodily or mental infirmity, except as herein stated." Judgment in favor of plaintiff for the amount of the policy, and defendant appealed. Other facts are stated in the opinion.

Markham and Dillon, E. A. Clark, and Harry Carr, for the appellant.

J. L. Murphy, and Browne and Putnam, for the appellee.

REED, C. Nearly all the errors assigned are based upon the admission and rejection of evidence; the first six being directed to the supposed error of the court in allowing Dr. Heron, the attending physician, and Patrick Harvey, the locomotive-engineer under whom the deceased was employed, to testify to the statements made by the deceased immediately after the injury was received, in regard to the manner and character of the accident by which the injury was received. It appears from the evidence that no one saw the accident, or knew of its occurrence or the injury until nearly half an hour after its occurrence; and that deceased was not conscious of having received serious injury, and continued to perform his duties for about that length of time, when the engineer observed the changed appearance and apparent suffering of his fireman, and made inquiries in regard to its cause. The statements made to the engineer, and testified to by him, and those made to the physician, and testified to by him, being all the evidence in regard to the character of the accident and the manner in which it occurred, it is insisted were hearsay, and incompetent, and erroneously admitted. It appears from the record that objections were made to the admission of such testimony by appellant's counsel, on the grounds above stated, and the court admitted the physician's testimony, "subject to the objection, to be decided upon the final hearing," and afterwards admitted the engineer's testimony, "subject to the motion to strike out." The record does not show that any further objection or motion was made, or that the ruling of the court was afterwards or otherwise expressed, and no exception appears to have been taken at any time. The exception at the close of the trial was in these words: "To which ruling of the court in finding the

issues in favor of said plaintiff, and against said defendant, and in rendering judgment upon said finding in favor of the plaintiff and against the defendant, the said defendant, by his counsel, then and there excepted." This cannot, in any sense, be construed as an exception to the admission of the testimony of the physician, the engineer, or any other witness. Hence, under the well-established rule of this court, we are relieved from the necessity of passing upon the admissibility of the testimony. The cause having been voluntarily submitted by both parties to a trial by the court without a jury, the testimony having been received by the court subject to a decision as to the competency thereof upon final hearing and upon a motion to strike out, and no further challenge to the testimony having been interposed, and no exception whatever having been reserved, we cannot properly sustain the assignments of error based upon the admission of said testimony. We may reasonably presume that counsel supposed at the trial, as we do now, that the court, of its own motion, disregarded all improper testimony, and based its finding and judgment upon competent evidence only: *Rollins v. Board of Comm'rs*, 15 Col. 103.

The questions to be determined upon the trial were: 1. Did the deceased, while following his avocation and performing his duties, receive an injury which caused his death? 2. Was such injury one against which he was insured by the appellant? 3. Was the policy of insurance void by having been obtained through fraudulent misrepresentations of the insured?

The proof of an injury having been received by the deceased was not dependent upon his declarations to the engineer or to his physician. If it had been, the admission of the testimony would probably have been more strenuously resisted at the trial. That there had been serious injury was obvious; its physical effects were patent and apparent. A brother of the deceased testified to seeing a bruise and discoloration upon the bowels of the deceased shortly after the alleged accident. The fact of the injury was at once established by the examination of the physician, and his testimony in regard to it, and supported by that of all the physicians who made an examination. The fact of the injury having been received by the deceased while attending to his duties was established by the evidence of Harvey, the engineer. These being the facts necessary to be proved, and

they not having been dependent upon the statements of the deceased, the peculiar attendant circumstances of the accident that caused the injury were incidental and secondary.

The seventh assignment of error is to the effect that the court allowed the witness Harvey to testify that the deceased had been continually at work for a long time previous to the injury, etc. We do not think this was error. The defense relied upon and sought to be established was, that the deceased had for years been afflicted with chronic hernia, and any and all proper testimony to show his habits, health, vigor, and ability to perform continued hard labor up to the time of the injury was competent as refuting that supposition: *McCarthy v. Travelers Ins. Co.*, 8 Biss. 362.

The other objections urged in regard to the admission of testimony appear to be far more technical than substantial. The special defense that the policy of insurance was fraudulently obtained by misrepresentations of his physical condition in the application for insurance, and that the deceased had been suffering from or subject to a hernia for several years previous, is not sustained by the evidence. It is based entirely upon the statements of the deceased to the physician after he received the injury. Dr. Heron's testimony was: "The first day he was injured, he told me he never knew he had a rupture. . . . He told me he never knew he was ruptured, or had any trouble, or had any hernia, or a rupture there at all. He said he noticed a little lump there, and I quizzed him. I asked him how far back he remembered it, and he said there was a lump there at times; he did not know, but about eight years back." This was substantially all upon which to base the defense, and, taken as a whole, is no admission whatever of the existence of hernia. He says he never knew he was ruptured, or had any trouble. This is almost conclusive evidence that no such trouble had existed, and that he had no definite idea of what a hernia was. It seems physically impossible that it could have existed that length of time and he have no trouble or knowledge of it. A large number of physicians were examined as experts, and the weight of the evidence was clearly against the possibility of his having been afflicted with hernia previous to the injury. The mother, with whom he had always resided, and with whom he resided at the time of his death, testified to having seen frequently his person exposed at the point of the supposed hernia, and that none existed; and if, as supposed, a

hernia was developed at an early age, she must have, during all these years, learned of its existence. The brother, who had during all the years associated and slept with him, who had frequently seen his person exposed, said: "If there had been anything there, I would have seen it"; that he saw nothing, and his brother never complained. Several witnesses who knew him intimately, and had for a long period, testified to his continued good health, bodily vigor, and a condition absolutely incompatible with the supposed disability. In order to make the supposed defense available, the previous existence of the hernia must have been established affirmatively by competent testimony, like any other material fact. It could not be established by supposition or presumption. "Neither party is bound to prove negatives. Upon each rests the burden of proving the affirmative matter which he alleges, and upon which issue is taken": *McCarthy v. Travelers Ins. Co.*, 8 Biss. 362. The statements to his physician in regard to the "lump" could, under no circumstances, be regarded as an admission for the purposes of this suit. The subject of the policy of insurance was not under consideration—probably not thought of—by either party to the conversation. There is no testimony that during treatment, including the incision at the surgical operation, any evidence was found of the existence of a case of chronic hernia. If, as supposed by counsel of appellant, the admission by the court of the statements of the deceased in regard to the manner in which the injury was received was error, the statements of deceased to his physician in regard to the former existence of a lump, being of the same character, was a very weak basis upon which to build a defense to defeat the action. It is apparent that the trial court found as a fact that deceased had not been afflicted with hernia previous to the injury, and that the injury received was the proximate and sole cause of death. By "proximate cause" is meant that cause which directly precedes and produces the effect, as distinguished from a remote cause. "Whether a cause is proximate or remote does not depend alone upon the closeness in the way of time in which certain things occur": *Cunningham v. Lyness*, 22 Wis. 245. "An efficient, adequate cause being found must be deemed the true cause, unless some other cause not incidental to it, but independent of it, is shown to have intervened between it and the result": *Kellogg v. Chicago etc. R. R. Co.*, 26 Wis. 223; 7 Am. Rep. 69; *McCarthy v.*

Travelers Ins. Co., 8 Biss. 362; *Accident Ins. Co. v. Crandal*, 120 U. S. 527; *Mallory v. Travelers Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410. After a careful examination of the evidence, we think it was ample to sustain the finding.

There is no evidence whatever to establish the defense that the insured "died of medical and surgical treatment, and no other cause." All the physicians who saw the case seem to have conceded that death was inevitable without a surgical operation. No charge of unskillfulness in performing the operation is made or suggested. That life was prolonged for quite a period by the operation is shown by the evidence. That the insured died from peritonitis resulting from the surgical operation is unimportant, when the fact is established that death was inevitable without the operation, and that after a consultation of skilled physicians the operation was resolved upon — necessarily dangerous — as the only possible means of preserving life.

It is ably urged in argument that deceased died of hernia, — a cause of death excepted by the policy. Although appellant in its third special defense, which is verified, averred "that the cause of said death was medical and surgical treatment, and no other cause," which seems to be greatly at variance with the theory of the argument, counsel, perhaps, was not precluded by it. We cannot adopt the construction of the exception in the contract of insurance so ably urged. The hernia must be regarded as the result of the accident that caused the death; the cause of death; the force of the blow received; the subsequent injury arising from the concussion, and the hernia as resulting. Deceased was insured against the accident by the terms of the body of the policy. Had he died of ordinary hernia, not produced by a serious and violent injury, appellant would probably have been released from payment; but when the hernia is the accidental result of the force of the blow, it cannot be regarded as excepted. In this view, both the contract of insurance and the exception can be allowed to stand without doing violence to either, — a rule always adopted when practicable. If not so construed, the exception must yield in this instance. It is "the fundamental rule of interpretation that policies of insurance are to be construed most strongly against the insurers, who frame them": *Accident Ins. Co. v. Crandal*, 120 U. S. 527; *Burkhard v. Travelers Ins. Co.*, 102 Pa. St. 262; 48 Am. Rep. 205.

It is now well recognized as a general rule, that where an

exception to a policy of insurance is capable of two meanings, the one is to be adopted which is most favorable to the insured: *State Ins. Co. v. Horner*, 14 Col. 391; May on Insurance, secs. 172-179; Wood on Insurance, secs. 141-146; *Allen v. St. Louis Ins. Co.*, 85 N. Y. 473; *Western Ins. Co. v. Cropper*, 32 Pa. St. 351; 75 Am. Dec. 561.

The business of the company is to insure against accident. The object of the insured in making the contract was to secure compensation and support in case of injury or disability arising from accident, and in case of accidental death, to furnish a fund for the benefit of the mother. The contract in the policy for and on which he paid the consideration was to pay the mother fifteen hundred dollars, "if death shall result . . . from bodily injuries effected during the term of this insurance through external, violent, and accidental means." That the contingency against which he insured did happen, and death ensued, is uncontradicted; that the bodily injuries resulting in death were received "through external, violent, and accidental means" was established beyond controversy. Such construction must be given to contracts of this kind as was evidently contemplated by the parties, and while so construing them as to protect the insurer against fraud, deception, and misrepresentation, give the insured the benefit of his contract and consideration for the premium paid. Where, as in this case, there was no evidence of fraud or intentional imposition, the defense must fail. We advise that the judgment be affirmed.

RICHMOND, C., concurred, and BISSELL, C., dissented.

Per CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

ACCIDENT INSURANCE. — As to when death by reason of hernia, rupture, erysipelas, rheumatism, gout, or any other kindred disease does not fall within the exception of an accident insurance policy, see note to *North American L. & A. Ins. Co. v. Burroughs*, 8 Am. Rep. 218, 219; *Bacon v. United States etc. Ass'n*, 123 N. Y. 304; 20 Am. St. Rep. 748. Compare note to *Paul v. Travelers Ins. Co.*, 8 Am. St. Rep. 763-766.

INJURY FROM RISK EXCEPTED IN POLICY. — The company is not responsible for the death of a banker who was killed while attempting to board a moving railroad car, if the policy of accident insurance contained a condition that it should not cover accidents, injuries, or death from attempting to enter a steam-vehicle: *Miller v. Travelers Ins. Co.*, 39 Minn. 548.

O'CONNELL v. TANEY.

[16 COLORADO, 353.]

EXECUTION — RIGHT OF CREDITOR TO ASCERTAIN WHETHER PROPERTY IS SUBJECT TO. — Under the Colorado statute, every interest in land, whether legal or equitable, is subject to levy and sale under execution, and a judgment creditor may by action determine the interest of the judgment debtor in the property to be sold prior to the sale, and thus settle the title in advance thereof.

HUSBAND AND WIFE — DIRECT CONVEYANCE OF LAND TO ONE ANOTHER. — Under the Colorado statute, the husband and wife may deal in reference to their joint property the same as though no marital relation existed between them. Either may convey directly to the other, and in the absence of fraud a good title may be conveyed, and if the title is held in the name of one only, that one, in equity, may be declared a trustee for and as to the interest of the other.

HUSBAND AND WIFE — WIFE AS TRUSTEE OF HUSBAND — LIABILITY OF HIS INTEREST IN LAND FOR DEBTS. — In an action against a wife as trustee of her husband's interest in land held in her name alone, to compel her to convey his interest therein to him, so as to subject it to the payment of his debts, an allegation of his insolvency is unnecessary.

Steele and Malone, for the appellant.

L. C. Rockwell, for the appellee.

HAYT, J. As the amended complaint was filed by leave of court, it superseded the original, and need only be considered.

In this pleading Patrick Taney, appellee, as plaintiff, made John O'Connell, Katharine O'Connell, John Sheehan, William C. Graves, and J. F. Conroy defendants. It alleges that on the thirtieth day of June, 1885, plaintiff recovered a judgment in the superior court of the city of Denver against said defendant John O'Connell, for the sum of \$2,262.30 and costs of suit; that afterwards a transcript of said judgment was filed in the office of the clerk and recorder of Arapahoe County; that in March, A. D. 1885, execution was duly issued by the clerk of the court rendering said judgment, and delivered to the sheriff of Arapahoe County for execution; that said sheriff returned the same in April, 1886, *nulla bona*.

It is also averred that the said John O'Connell has no property interests, either real or personal, in the state of Colorado out of which said judgment, or any portion of it, could be made; that the action wherein said judgment was rendered in favor of the plaintiff was based upon a certain appeal bond signed by said John O'Connell as surety for one Michael Green. Under date of June 27, A. D. 1881, and immediately prior to said day and date, said John O'Connell

had been working upon the Denver and Rio Grande railroad in various capacities. While so engaged in said business he had made a large sum of money, to wit, not less than eight thousand dollars. That in October, 1881, he bought certain lots in the city of Denver with the money so earned, but had the deed for said property made to his wife; that in November he bought certain other lots, taking the deed in the same way; that in February, 1882, he purchased certain additional lots, causing these lots to be transferred to his wife. Plaintiff avers that Katharine O'Connell gave no consideration whatsoever for any part or portion of said premises so purchased, but that the whole consideration paid therefor was paid by her husband out of his own money and property.

The remaining portion of the complaint is taken up with reference to certain real estate situated in the state of Kansas, for which certain Denver property, not enumerated above, had been traded. There are allegations in this pleading charging the defendants Sheehan, Graves, and Conroy with conspiracy with the O'Connells to cover up the property in Kansas so as to hinder and delay the plaintiff in collecting his judgment—but as the court below held that it had no jurisdiction over the property in Kansas, it is unnecessary to further consider the allegations in this respect. Plaintiff demands judgment, — 1. That the said Katharine O'Connell be declared to be a trustee for said John O'Connell as to the lands described in the complaint; 2. That she be required to convey said lands to her said husband, and that the same be sold to pay plaintiff's said judgment. The defendants Katharine O'Connell and John O'Connell each filed separate answers to this amended complaint. These answers contained, *inter alia*, specific denials of each allegation of the complaint. A replication was thereafter filed. The cause was tried to the court on December 10, 1885, without a jury. Upon the conclusion of the trial, the cause was taken under advisement.

On March 5, 1885, certain findings of fact were made and a decree entered thereon. By the first of such findings all the equities were determined in favor of plaintiff; also that the judgment was duly entered in favor of plaintiff, as alleged in the complaint. The court further finds that the said defendant John O'Connell was jointly interested with his wife, Katharine O'Connell, in boarding men working on the Rio Grande railroad, and that they accumulated the sum of eight thousand dollars in the enterprise, which went into the pur-

chase of the property, the deed to which was taken in the name of the wife; that said John O'Connell had a certain interest in said property, which interest stood in the name of Katharine O'Connell, who was decreed to be a trustee holding said property for John O'Connell to the extent of his interest therein. The court, being unable to find the extent of the interest of the said John O'Connell and Katharine O'Connell, respectively, in the premises, there being no evidence as to the amount of money earned and received by the said John O'Connell and Katharine O'Connell, respectively, while they were in the employ of the said railroad company as aforesaid, ordered an accounting of these matters, and also of the moneys received by the parties, as rents, issues, and profits of the above, described premises, situated in the said city of Denver, Arapahoe County, aforesaid.

As a result of such accounting, the court, upon the second day of the following month of July, found that John O'Connell and Katharine O'Connell were equal owners in the property, and ordered appellant to pay appellee's claim within twenty days from the date of said decree. In default of such payment the said Katharine O'Connell was ordered to deed an undivided one half of said property to John O'Connell, in order that the same might be sold under execution to satisfy appellee's claim as aforesaid.

By section 83 of the General Statutes, every interest in land, whether legal or equitable, is made subject to levy and sale under execution. Under this provision appellee might have caused the execution issued upon the judgment in the case of *Taney v. O'Connell* to have been levied upon the latter's interest in the very property here in controversy, and had the same sold in satisfaction thereof. Had this course been pursued, the purchaser thereafter could have maintained an action for the purpose of having his interest in the premises determined.

The judgment creditor was not, however, compelled to resort to this mode of procedure. The action which he did institute might be pursued with at least equal propriety. Many reasons might be suggested in favor of the latter course. Until the interests of the judgment debtor in the property should be established by a court of competent jurisdiction, a sale of the undetermined interest would not be likely to result in any substantial diminution of the creditor's claim. Purchasers can rarely be induced to pay more than a nominal

sum for an interest in property dependent upon a successful determination of a lawsuit, with its usual uncertainties. In order that the best results may be attained, and the interest not sacrificed, prudence will usually dictate the settling of the title in advance of sale, as was attempted in this case.

It is claimed, however, that the decree of the court below cannot be maintained, for the reason that it is not alleged in the complaint that John O'Connell was insolvent at the time the legal title to this property was placed in his wife. If this were a suit to set aside the conveyances on the ground of fraud, in the interest of creditors, such an allegation would be necessary. But it is not such a suit; on the contrary, this action proceeds upon the theory that such conveyances were legal and valid. To defeat them for any reason would be to defeat the present action. It proceeds, and can only be successfully maintained, upon the ground that the husband has a resulting trust in the property, the legal title to which is in the wife. Under our law, husband and wife may deal in reference to property the same as though no marital relation existed between them. The husband may deed direct to the wife, or the wife to the husband, and in the absence of fraud, a good title may be conveyed.

As, in the absence of the marital relation, it is well established that where one has acquired title to property which in equity belongs to another, the party holding the legal title will in equity be declared a trustee, and decreed to convey to the party equitably entitled thereto, so in this case the husband might have maintained an action for his interest in the very property in controversy. It is this interest that plaintiff is seeking to subject to the payment of his debts.

It is not claimed that this property was settled upon the wife in pursuance of any agreement, antenuptial or post-nuptial, or that it was conveyed as a gift from the husband, as in *Thomas v. Mackey*, 3 Col. 390. And no allegation of insolvency at the time of the conveyance is necessary in order that the husband's interest may be subjected to the payment of his debts: *Gardiner Bank v. Wheaton*, 8 Me. 373.

As the judgment of the court below must be affirmed upon the merits, it is not necessary to determine whether or not the judgment was properly excepted to.

HUSBAND AND WIFE—CONVEYANCES BETWEEN. — A husband and wife may make contracts for the conveyance of property between themselves which will be upheld in equity if they contain the essential requisites:

Haussman v. Burnham, 59 Conn. 117; 21 Am. St. Rep. 74, and note. A conveyance of real estate directly from a husband to his wife will be upheld, so far as it is equitable: *Munger v. Baldridge*, 41 Kan. 236; 13 Am. St. Rep. 273, and note; *Corcoran v. Corcoran*, 119 Md. 138; 12 Am. St. Rep. 390, and note; *Turner v. Shaw*, 96 Mo. 22; 9 Am. St. Rep. 319, and extended note; *Callahan v. Houston*, 78 Tex. 494; *Taylor v. Opperman*, 79 Cal. 468. When a husband obtains credit on the statement that certain property is his, a conveyance of said property by him to his wife will be set aside: *Hopkins v. Joyce*, 78 Wis. 443.

SOLIS CIGAR COMPANY v. POZO.

[16 COLORADO, 388.]

A TRADE-MARK MAY CONSIST of a name, or a device, or a peculiar arrangement of words, or words with some device of greater or less novelty, which have been applied to designate the goods manufactured by a particular person; and when the manufacturer has thus adopted a trade-mark, he thereby acquires the right to whatever profits may result from his superior skill, knowledge, or honesty of purpose, and this right cannot be impaired by any piratical use of the device by another.

TRADE-MARKS — INFRINGEMENT — WHAT CONSTITUTES. — Exact similarity is not necessary to constitute an infringement of a trade-mark; for colorable imitations are as much the subject of legal redress as exact or perfect similitudes. What is necessary in all cases to constitute an infringement is a similarity which will operate to convey a false impression to the ordinary purchaser, and serve to deceive and mislead him. Hence it is always essential to show that the imitation is of a character to escape the ordinary care and caution used in the purchase of the articles protected.

TRADE-MARKS. — THE WORDS "FABRICA TOBACOS" are of common use in the tobacco trade, and, standing alone, are not the subject of a trade-mark.

TRADE-MARKS — INFRINGEMENT — INJUNCTION. — The use of a cigar-label will not be enjoined on the ground that it infringes another's trade-mark, unless the two devices, taken as a whole,— words, pictures, lines, and devices,— are so similar that a purchaser, using the ordinary care and caution which may be expected of the purchasing public, would be likely to mistake the one for the other.

TRADE-MARKS — EQUITABLE ASSIGNMENT OF. — Where the assignee of a trade-mark, who is also the successor of the original owner, continues to use it with the consent and procurement of the latter, without a formal transfer of the right, he will be treated as the equitable owner, and awarded relief against an infringement, notwithstanding the informality of the transfer.

TRADE-MARKS — IMMATERIAL MISREPRESENTATION. — The word "copyrighted" on a cigar-label claimed as a trade-mark, when in fact it has not been copyrighted, is not such a misrepresentation as will prevent the owner from receiving relief and protection against infringement.

TRADE-MARKS — MATERIAL MISREPRESENTATION. — The word "Habana" on a cigar-label claimed as a trade-mark, when in fact the cigars on which the label appeared were mere Havana filler, is such a material misrepresentation and deceit on the public as will deprive the owner of any relief or protection against an infringement.

BILL by the Solis Cigar Company against Pozo and Suarez to recover damages, and to enjoin them from interfering with a trade-mark which the Solis company claimed to own. The Solis cigar-label is thus described: "The Solis brand was a picture of a tobacco plant, with a foreground of land, a background of water, with sky in the distance, and flowers on the stem projecting above the leaves. On the top of the label were the words, in capitals, 'EL CABIO.' A little over one third of the way down, and on either side of the picture, were the words, in capitals, 'FABRICA TOBACOS,' and below and underneath those, 'DE R. SOLIS.' Resting on the ground was the word, in capitals, 'HABANA,' and below that, in smaller type, the word 'Copyrighted.' At the bottom of the label were the words 'R. Solis, Manufacturer, Denver.' The type in which this label was printed was clear cut, with fancy lines and terminals to various of the letters, as in E, L, and C, etc.; the cross, for instance, on the middle stem of the E was an upright line, terminating in a scroll at either end. These were the characteristics of the type used on that label." The Pozo and Suarez cigar-label, claimed to be an infringement, is thus described: "The other label was a picture of a tobacco plant, topped with three flowers instead of seven, which were on the first brand, but without a visible stem. The plant rested on the ground, with some growing plants underneath, but there was no water in the background, nor any sky. It was simply the plant on a blue background, which was the prevailing color of the El Cavigio brand. On either side of the flowers were the words 'EL CAVIO,' and on either side of the plant, arranged as in the other brand, were the words 'FABRICO TOBACOS,' and beneath them 'DE POZO & SUAREZ.' Below the plant was the word 'HABANA,' in capitals, and at the bottom of the entire label were the words 'Pozo & Suarez, Manufacturers, Denver, Col.' The type of the two brands was totally dissimilar; that of the El Cavigio brand being fanciful, and the other plain and un-ornamental." Other facts are stated in the opinion. On the trial the bill was dismissed, and plaintiff appealed.

W. S. Decker, and A. B. McKinley, for the appellant.

BISSELL, C. The right which a manufacturer has in a trade-mark is everywhere recognized as property. The mark may consist of a name, or a device, or a peculiar arrangement of words, or such words with some device of greater or less

novelty, which have been applied to a manufacture to designate the goods as made by a particular person. When a manufacturer has thus distinguished the goods he makes by a peculiar device, so that they may be known in the market as his, he thereby acquires the right to whatever profits may result from his superior skill, knowledge, or honesty of process; and this right may not be impaired by any piratical use of the devices which serve to mark them, and lead the public to think that they are his. The legal right to the use of the trade-mark springs from its usefulness to point out the original ownership of the article to which it is affixed, or to give notice to the public who is the producer. From this right the power of legal protection is derived. The first difficulty which arises here is to determine the question of infringement. Exact similarity is not necessary. To insist on that would be to permit most wrong-doers to evade responsibility. Colorable imitations are as much the subject of legal redress as the more exact and perfect similitudes. What is necessary in all cases is a similarity which will operate to convey a false impression to the ordinary purchaser, and serve to deceive and mislead him. The rule is grounded as much on the notion that the public is to be protected as on the theory that the inventor may have the exclusive benefit of the reputation acquired by the thing which he has produced. For this reason, it is always essential to show that the imitation is of a character to escape the ordinary care and caution used in the purchase of the articles protected. The case made is not brought within the limits of this rule. It is difficult to declare the legal extent of the plaintiff's right. The words "Fabrica Tabacos" are words of common use in the tobacco trade, and have been for many years, in Spanish-speaking communities, applied to all known manufactured products of the plant. Alone they could not be the subject of a trade-mark: *Gilman v. Hunnewell*, 122 Mass. 139.

Had these words, or the picture, been novel, and used in combination, without more, some basis might be found for the claim that they made a trade-mark. But the picture of the plant, in connection with these or similar words, has been for many years used to designate the manufactured article. The two alone would not, under the testimony, serve the purpose. To all this was added the cabalistic words "El Cabio," and the name "De R. Solis." As a whole, there was produced that which would constitute a trade-mark according to accu-

rate legal definition. When, however, the whole was looked at, there was no room for the deception of the purchaser by the use of the piratical design, — the El Cavo brand. Doubtless it was designed and selected without the honesty of purpose which usually animates all fair business competition. It seems to have been chosen to gain some possible advantage; but it does not come up to the necessities of the rule. “El Cavo” alone, if the words “El Cavo” had been all of the device, might have infringed. Had the words with the picture together constituted the trade-mark, then the infringement might have been complete; but it took the words, the picture, and the words “Fabrica Tabacos” and “De R. Solis” to make the brand. In that complained of there were the words “El Cavo,” the picture of the tobacco plant, and the words “Fabrica Tabacos De Pozo & Suarez.” In either case, the whole, taken together, constituted the device. It is unnecessary to discuss the lack of similarity in the pictures; for while one was artistic and pretty, with its land, water, and sky, and the other was a pictorial failure, and nothing but a naked plant of poor design and inartistic finish, there was enough resemblance to deceive. To each, however, is attached the name of the manufacturer in bold type. If the purchaser was looking for the “El Cavo de Solis,” he would not be misled by the “El Cavo de Pozo & Suarez.” It is agreed by all the authorities that the court will not restrain a defendant from using a label, on the ground that it infringes the plaintiff’s device, unless the trade-marks, taken as a whole, — words, pictures, lines, and devices, — are so similar that the purchaser, using the ordinary care and caution which may be expected of the purchasing public, would likely mistake the one for the other. This cannot, on the case as made, be held to be likely to occur. No purchases of one for the other were shown, nor was any proof of that sort offered. It did not appear that any trade had been lost, nor that any customer, retail or wholesale, had been misled. While in this class of cases actual damage need not be shown in order to recover for the piracy, yet it is a strong circumstance to influence the court on a bill for an injunction, filed before the right has been established by an action at law, especially where the infringement is more speculative than absolute. There was a clear failure of the strong proof which courts of equity require before they grant injunctive relief: *McLean v. Fleming*, 96 U. S. 245; *Blackwell v. Wright*, 73 N. C. 310; *Pop-*

ham v. Cole, 66 N. Y. 69; 23 Am. Rep. 22; *Gilman v. Hunnewell*, 122 Mass. 139.

On the trial of the case the court denied the injunction, and placed the decision on the principle that, to entitle a complainant to the protection afforded by the exercise of equitable powers, the device which served to inform the public must be honest, not only in its suggestions of place of manufacture and persons producing, but in the statements of the composition and material of the product. The rule was accurately stated, and the only question is as to the applicability of the doctrine. It was manifest that the original trade-mark had been adopted by R. Solis. He had devised and applied it to the El Cabio brand of cigars. The Solis company, however, by transfer and succession, came into the right to use the brand. After the organization of the company, by the consent and procurement of the original owner, who was the largest individual stockholder of the concern, they continued the use of the mark. It is true that there was no formal transfer of the right, but the circumstances clearly manifest the intention of the parties, and the case becomes one of a continuing trade-mark in the possession of a corporation which succeeded to all the rights, good-will, and trade of the former owner. In such a case the corporation would be treated as the equitable owner. At any rate, the respondent could not be heard to complain, and the plaintiff would not be denied relief on that ground.

The other branch of the question — deceit of the public — is not so free from difficulty. If it be conceded that the trade-mark tended to deceive the public in any material particular, the relief must be denied. Below the picture of the tobacco plant, it will be remembered, were the words "Havana," "Copyrighted." They were words of definite meaning to the trade, and probably of equally certain significance to the public. They were not, however, as is clear from the evidence, of the same import to each class. The word "copyrighted" meant the same to everybody. It implied that the protection of the statute applicable to such matters had been secured. This was probably believed to be true, but was without foundation. The misrepresentation, however, was unimportant. It did not tend to deceive the public in respect to any of those matters with which the law concerns itself. The public might buy with the same reliance on all the representations as to the place of production and ownership,

whether the marks were protected by the statute, or guarded only by the appropriation and user of its owner. This element would neither be considered nor depended on by the purchaser, whether he was in or out of the trade. With regard to the word "Habana," the case is not so easy of settlement. This was expressive of a quality, and an absolute representation of the material of which the cigars were made. Some sorts of deception may be practiced without loss of right to the legal protection usually given this species of property. It is possible for the proof to show that the public received an erroneous impression, which would not, of itself, be sufficient to destroy the validity of the trade-mark. Neither need the deception be of such a character as to work a positive injury to the purchasers, to deprive the user of his exclusive privilege. In the first case it must not concern any of the essential particulars which the trade-mark protects, and in the latter it must not be absolutely false as to any of its leading elements: *Meriden Britannia Co. v. Parker*, 39 Conn. 450; 12 Am. Rep. 401; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218.

That the representation made by the trade-mark as to the materials of which the cigars were made are of the sort which the law says must appear to be absolutely truthful, where its protection is sought, there can be no question. They are of what is by all the authorities recognized as the substance of the device. Such words are used to lead the public to believe that the article sold possesses certain qualities known to belong to such material. They are used to influence the public to buy, because of the public taste for such things. It seems clear that, under the proof, this case is brought within the full scope and application of this principle. The word "Habana" must be taken as a part of the mark which the plaintiff wants protected. It is on a conspicuous part of the label. It is in large, bold-faced type, to catch the eye of the purchaser. It is evidently designed to attract his attention. Like the other words, it is Spanish, and commonly used in the country where that sort of tobacco is grown. The whole purpose of the manufacturer was evidently to lead the public to believe that the cigar was made of that tobacco which is so much sought after and preferred by the smoking public. Yet it was not wholly true. The plaintiff admitted that the cigars sold under that brand were made of Havana filler, seed binder, and Sumatra wrapper. Nothing but the filler came legiti-

mately within the definition of Havana tobacco. It clearly appeared that there was a broad distinction made in the trade between seed, seed Havana, and clear Havana cigars. One was made wholly of domestic tobacco; one of domestic and imported Cuban and Sumatra tobaccos; the third of tobacco wholly grown in Cuba. Only the last was sold as clear Havana, and that was always sold by the use of the word "clear" joined to Havana. It is evident that custom would not permit the trade to be deceived. Strict honesty was observed in all dealings with wholesale purchasers, but little attention was given to the opinions of the purchasing public. They were neither expected to know, nor was it desirable that they should learn. The maker was wholly indifferent to the impression which they might receive. Such a course is in contravention of the principles observed by courts of equity in the administration of this branch of the law. These courts have adopted rules which are founded in honesty and good sense, and which are designed to rebuke fraud, and encourage fair dealings with the public. Judged by these rules, as they have been communicated and applied, this case had no standing in court, and the bill was properly dismissed. The judgment should be affirmed.

REED, C., and RICHMOND, C., concurred.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

TRADE-MARK, WHAT MAY CONSTITUTE: See *El Modelo C. Mfg. Co. v. Gato*, 25 Fla. 886; 23 Am. St. Rep. 537, and note; *Putnam Nail Co. v. Dulaney*, 140 Pa. St. 205; 23 Am. St. Rep. 228, and note; *Hoyt v. Hoyt*, 143 Pa. St. 623; 24 Am. St. Rep. 575, and note; note to *Partridge v. Menck*, 47 Am. Dec. 284-295.

TRADE-MARK, INFRINGEMENT OF, WHAT CONSTITUTES: Note to *Partridge v. Menck*, 47 Am. Dec. 295-299; *Liggett etc. T. Co. v. Reid T. Co.*, 104 Mo. 53; 24 Am. St. Rep. 313, and note.

TRADE-MARK, TRANSFER OR ASSIGNMENT OF: See *Symonds v. Jones*, 82 Me. 302; 17 Am. St. Rep. 485, and note 496-499. The right to use a trade-mark will pass by a transfer of the business in which it has been used, unless there is a reservation to the contrary: *Laughman's Appeal*, 128 Pa. St. 1; *Merry v. Hoopes*, 111 N. Y. 415.

McDERMITH v. VOORHEES.

[16 COLORADO, 402.]

DEED OF TRUST — EVIDENCE TO CONTRADICT RECITALS. — When a deed of land is made to one as assignee, and recites that it was executed “for and in consideration of the conditions of the assignment made this day for the benefit of the creditors of the” grantor, the recital is conclusive that the grantee took the property in trust, and not as a purchaser, and cannot be contradicted by parol evidence showing an intent to make an absolute conveyance of the property in payment of the debts due the grantee and other creditors.

TRUST DEED — ASSIGNEE AS TRUSTEE. — When a trust deed of land is made to one as assignee, in consideration of an assignment for the benefit of creditors to be made by the grantor, and such assignment is never executed, the grantee takes and holds the legal title in trust for the grantor and his heirs.

A. S. Weston, for the appellants.

A. B. McKinley, for the appellees.

REED, C. This was a suit brought by appellees to remove a cloud from the title to quite a large number of lots in an addition to South Denver, and praying that claimants be declared the legal owners. The property originally belonged to one Sullivan D. Breece, who, in the year 1876, being insolvent or embarrassed financially, conveyed the property by quitclaim deed to one William J. McDermith. The part of the deed necessary to be considered is as follows: —

“This deed, made this nineteenth day of August, in the year of our Lord 1876, between Sullivan D. Breece, of the county of Lake and state of Colorado, of the first part, and William J. McDermith, assignee of said Breece, of the county of Lake and state of Colorado, of the second part, witnesseth that the said party of the first part, for and in consideration of the conditions of the assignment made this day for the benefit of the creditors of said Breece, and the further consideration of one dollar to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has remised, released, sold, conveyed, and quitclaimed, and by these presents does remise, sell, convey, and quitclaim, unto the said party of the second part, his heirs and assigns forever, all the right, title, interest, claim, and demand which the said party of the first part has in and to the following described real estate, lying and being in the county of Arapahoe and state of Colorado, to wit” (followed by a description of the property).

It is alleged that Breece died intestate in November, 1877; that Margaret A. Breece, Edward P. Breece, and Jennie V. Zane were his surviving heirs; that McDermith died intestate in 1880, leaving as surviving heirs Anna McDermith, one of appellants, and two children, Oro and William J., infants; also, "that said deed was made by said Breece in trust for the benefit of certain creditors of said Breece, with the intention of providing by a contemporaneous instrument for the payment of their debts out of said property; that no such instrument was executed by McDermith; that said indebtedness was shortly afterwards satisfied by or on behalf of said Breece without resort being had to the property mentioned in said deed; . . . that no reconveyance of said lands was ever made by McDermith to Breece or his heirs; that Margaret A. Breece, Edward P. Breece, and Jennie V. Zane, the surviving heirs of Sullivan D. Breece, conveyed all their right, etc., in said lands to plaintiff Voorhees on the thirtieth day of April, 1884, and afterwards said Voorhees conveyed one half thereof to the plaintiff Samuel W. Shepard."

Plaintiffs also claimed title to the property by treasurer's deeds on sales for taxes from the year 1876 to 1883, some of the deeds being for the entire property, others for a part; all of which tax titles had by various conveyances been conveyed to plaintiffs. The portions of the answers necessary to an understanding of the issues and for a determination of the case in this court are as follows:—

"Admits that said Breece was, at the time of making said deed, the owner of said lands; denies that it was the intention of said Breece to provide by a contemporaneous instrument for the payment of any such creditors out of the proceeds of the sale of said land, but alleges that said deed was an absolute conveyance of said land to said William J. McDermith, in consideration of the release executed by him and other creditors releasing said Breece from all claims against him held by said creditors, and that said release was executed at the time of the execution of said deed of conveyance from said Breece to said McDermith; but denies that said indebtedness, or any part thereof, was shortly, or at any time thereafter, settled or satisfied by or on behalf of said Breece without recourse to said property, or otherwise; admits that said Breece died in 1877; admits that no reconveyance was ever made by said McDermith to said Breece or his heirs; alleges that said McDermith was under no obligation, in law or

equity, so to do; and alleges that the pretended conveyance of the supposed heirs of said Breece conveyed no right or title to plaintiffs; alleges, on information and belief, that the pretended title or claim of plaintiffs, by virtue of said tax deeds and the intermediate conveyance, is wholly void and without effect; and alleges, on information and belief, that said supposed taxes were not assessed and levied in pursuance of the statutes, and that said supposed sales were not made in the manner provided by law."

The case was tried to the court, who found generally for the plaintiffs, decreeing the relief asked. The court found specially, with other findings, that the conveyance to McDermith was in trust for the benefit of creditors, and did not vest any title in McDermith save a trust for the benefit of creditors; that, in due course of administration, all the debts of Breece were paid and discharged by the administrator, without recourse being had to the property in controversy; that thereupon the title vested in the heirs of Breece, and by their conveyance passed to appellees; that prior to and at the time of the bringing of the suit appellees were in the actual and peaceable possession of the property; and that the appellees had good title also to the property through the sales for taxes and subsequent conveyances to them.

There are several errors assigned upon the action of the court in admitting and rejecting evidence, which we do not find it necessary to determine. The first and fundamental question to be determined was and is the nature and intention of the conveyance of Breece to McDermith, — whether it was a conveyance in trust to McDermith as assignee for the benefit of creditors, or an absolute conveyance of the property in payment of debts due McDermith and other creditors. The latter is contended by appellants. The solution of the question depends upon a construction of the deed itself. The language is plain; the object and intention of the grantor are clearly and definitely expressed. It is said: "Sullivan D. Breece, . . . of the first part, and William J. McDermith, . . . assignee of said Breece." The qualifying phrase relates to the character in which the grantee took, — not as purchaser, but in trust for creditors. The term "assignee" tends to negative any supposition of an intention of vesting the estate in fee in the grantee himself. It was further recited that the conveyance was made "for and in consideration of the conditions of the assignment made this day for the

benefit of the creditors of said Breece, and the further consideration of one dollar," etc. These recitals in the grant are conclusive of this branch of the case. It is a principle as old as the law of conveyances, that, against a use declared in a deed, no averment to the contrary can be received. The maxim is: "In the absence of ambiguity, no exposition shall be made which is opposed to the express words of the instrument": Broom's Legal Maxims, 619. "It is not allowable to interpret what has no need of interpretation": Co. Lit. 147 a; *Lanyon v. Crane*, 2 Saund. 167. The averment in the answer is one defeating the operation and effect of the conveyance itself, which is not permitted, because the effect would be to subvert the entire transaction, as well as to violate established rules of evidence: 1 Greenl. Ev., sec. 26, and note; *Lazell v. Lazell*, 12 Vt. 443; 36 Am. Dec. 352; *Grout v. Townsend*, 2 Hill, 554; *Byers v. Mullen*, 9 Watts, 266.

Parol evidence is not admissible when it is offered to contradict the terms of the instrument creating the estate: 2 Washburn on Real Property, 479; 2 Greenleaf's Cruise on Real Property, 315; *Strimpfler v. Roberts*, 18 Pa. St. 283; 57 Am. Dec. 606; *Livermore v. Aldrich*, 5 Cush. 431; *White v. Carpenter*, 2 Paige, 238.

"Where a trust results by force of the written instrument, it cannot be controlled, rebutted, or defeated by parol evidence of any kind": 1 Perry on Trusts, sec. 150; *Langham v. Sanford*, 17 Ves. 435; *Rachfield v. Careless*, 2 P. Wms. 158; *White v. Williams*, 3 Ves. & B. 72.

The claim or contention that the property was conveyed to McDermith with the intention of vesting him with an absolute title that could descend to his heirs is in express contradiction of the recitals of the deed, by which the heirs must take, if they take at all; and under all the authorities, English and American, an allegation or averment in the answer that the conveyance was absolute, and in consideration of the release by McDermith and others of debts, was faulty and vicious; and no oral proof in support of it, and contradicting the recitals in the deed, could legally be admitted. But if this were not so, and parol proof could be admitted, that given fell far short of establishing the averment, and the contention failed for want of proof. There was a great dearth of evidence. Breece and McDermith were both dead long before the trial was had. The heirs had little or no knowledge of the transaction. Judge Weston, counsel for appellants, was, at

the time of the conveyance, or shortly after, the attorney of Breece. Aside from his, the oral evidence was unimportant. His evidence, so far from establishing appellants' contention, was in support of the recitals in the deed. It shows that he drew up, as attorney of Breece, an assignment which Breece expected all his creditors to accept, but which was not accepted by all, but was signed by a number of them; also, that there was another document drawn by him, which was never executed at all. From this it is apparent that the intended trust was never consummated, nor accepted by McDermith as assignee, or by the creditors. The trust never having been perfected as contemplated in the deed, counsel seems to erroneously suppose that the title vested in McDermith discharged of the trust. When it failed by the acts of the different parties to vest the title as contemplated, the conveyance was void for all intended purposes, and McDermith only held the legal title in trust for Breece and his heirs. "If the declaration of trust . . . plainly shows that the intention was that the grantee should not take as beneficiary, and that the sole purpose of the grant was to carry out the purpose of the trust, which fails, the grantee will take in trust for the grantor and his heirs": 2 Washburn on Real Property, 473; Perry on Trusts, sec. 159; *Gibbs v. Rumsey*, 2 Ves. & B. 294; *Hughes v. Evans*, 13 Sim. 496; *Easterbrooks v. Tillinghast*, 5 Gray, 17; *Williams v. Coade*, 10 Ves. 500; *Hawley v. James*, 5 Paige, 318.

There was no error in the findings of the trial court on the propositions above discussed, viz., that the conveyance did not vest in McDermith or his heirs any title, interest, or estate whatever, except in trust for the purposes declared in the deed; also in finding from the evidence that the debts of Breece were paid by his administrator, without resort being had to the property in controversy; also that McDermith held the title to the property in trust for Breece, and after his death in trust for his heirs, from whom claimants took a good title. These findings being correct, it is unnecessary to examine the other branch of the case, and determine the regularity of all the proceedings through which claimants allege their acquired title by sales for taxes and conveyances, etc. We advise that the judgment and decree be affirmed.

RICHMOND, C., and BISSELL, C., concurred.

Per CURIAM. For the reasons stated in the foregoing opinion, the decree of the court below is affirmed.

CONVEYANCES — PAROL EVIDENCE. — The nature and quality of interest conveyed by deed must be ascertained from the instrument itself, and is not open to explanation by parol evidence: *Caldwell v. Fulton*, 31 Pa. St. 475; 72 Am. Dec. 760; *Melton v. Watkins*, 24 Ala. 433; 60 Am. Dec. 481; *Woollen v. Hillen*, 9 Gill, 185; 52 Am. Dec. 690.

TRUST — CONVEYANCE WITHOUT CONSIDERATION. — Where a conveyance has been made without any consideration expressed or implied, the legal title only passes to the grantee which he holds in trust for the grantor: Note to *Neill v. Keese*, 51 Am. Dec. 758, 759.

TRUST — CONVEYANCE IN TRUST FOR A PURPOSE WHICH FAILS. — Where property is conveyed in trust for a particular purpose or object, if that purpose or object fails a resulting trust will arise for the benefit of the grantor: Note to *Neill v. Keese*, 51 Am. Dec. 757.

IN RE CUMMINS.

[16 COLORADO, 451.]

CRIMINAL LAW — FALSE PRETENSES BY TWO — GUILT OF ONE WILL NOT SHIELD THE OTHER. — Where two persons conspire together to accomplish an unlawful purpose, and one, by false pretenses, obtains money from the other, and parts with it in furtherance of the unlawful purpose, a prosecution will lie against him, on the complaint of the other party, for obtaining money under false pretenses, notwithstanding the guilt of the party complaining.

HABEAS CORPUS. The petitioner, Cummins, was examined before a justice of the peace on four separate charges of obtaining money under false pretenses. It appeared from the complaint and from the evidence that the money he had obtained by the alleged false pretenses was paid him, in each instance, by the prosecuting witnesses in furtherance of an illegal purpose to obtain coal-lands from the United States by fraud. At the close of such examination, Cummins was required, in each case, to give bond for his appearance at the next term of the district court to answer the charges, or in default of such bond, to be committed to the county jail to await the action of the grand jury. He failed to give bond, was committed to jail, and now seeks to regain his liberty under the writ of *habeas corpus*.

Dixon and Dixon, for the petitioner.

J. H. Maupin, attorney-general, and *H. H. Babb*, for the people.

HAYT, J. If two persons conspire together to accomplish an unlawful purpose, and one, by false pretenses, obtains money from the other, which the latter parts with in further-

ance of the illegal purpose, will a prosecution lie against the former for obtaining the money under false pretenses?

This is the substantial question presented upon the record. Counsel for petitioner contend that it will not, while the affirmative is assumed by the attorney-general. The authorities bearing upon the question cannot be reconciled. In the leading cases of *Commonwealth v. Henry*, 22 Pa. St. 253, and *McCord v. People*, 46 N. Y. 470, exactly opposite conclusions were reached upon facts that are quite similar.

In the former case it was alleged in the indictment that the defendant, intending to defraud the prosecutor, falsely asserted to him, and also to another person who communicated it to him, that he had a legal warrant for the arrest of the daughter of the prosecutor for an offense punishable by a fine and imprisonment, and that he threatened to arrest her, by means of which representation he obtained from the prosecutor property of the value of one hundred dollars. The trial court having quashed the indictment, its judgment was reversed by the supreme court, and the indictment declared sufficient.

In the case of *McCord v. People*, 46 N. Y. 470, the indictment charged the defendant with having falsely and fraudulently represented that he had a warrant for one Miller, and that Miller, believing said false representations, was induced and did deliver to the defendant a gold watch and diamond ring. In this case it was held that, as the property had been voluntarily surrendered as an inducement to the officer to violate the law and disregard his official duties, the indictment could not be sustained; the court declaring that the statute against obtaining money by false pretenses was designed to protect only those who for an honest purpose are induced, by false or fraudulent representation, to give credit or part with their property, and not to protect those who do this for an unworthy or illegal purpose. The opinion of the court in this case is quite brief, while Peckham, J., filed an able and exhaustive dissenting opinion.

In support of the majority opinion two cases are cited by the court, viz., *People v. Williams*, 4 Hill, 9; 40 Am. Dec. 258; *People v. Stetson*, 4 Barb. 151. An examination of the former case shows it to be no authority upon the question presented here, the decision being simply to the effect that a false representation, to be within the statute, must be such as is calculated to mislead persons of ordinary prudence and caution,

— a conclusion not generally accepted elsewhere: 2 Bishop's Crim. Law, sec. 433. In *People v. Stetson*, 4 Barb. 151, it seems, however, to have been determined that if the owner in parting with his property, etc., was himself guilty of a crime, the indictment under the statute could not be sustained; and a similar conclusion was reached in *State v. Crowley*, 41 Wis. 271, 22 Am. Rep. 719, in which case the information charged a conspiracy on the part of several defendants to defraud the prosecutor of his money; and the proof showing that the conspiracy charged was in connection with an unlawful enterprise, in which the prosecutor and the defendants were *particeps criminis*, it was held that a conviction was not warranted. It appeared, also, that had the prosecutor exercised common prudence and caution he could not have been misled by the false pretenses by which he was induced to part with his money.

In opposition to this doctrine, and in line with the Pennsylvania decision, we find *Commonwealth v. Morrill*, 8 Cush. 571. Mr. Bishop, reviewing the different conclusions, says: "Another doctrine, sustained in New York, is, that where, if the false pretenses were true, the person parting with his goods would be guilty of a crime therein, or where he actually commits an offense in parting with them, the indictment for the cheat cannot be maintained. On the other hand, the Massachusetts court appears to have directly discarded this doctrine. The point decided was, that a defendant cannot set up, in answer to an indictment of this nature, any wrongful representation of the person injured concerning the goods charged to have been obtained through the false pretense. 'Supposing,' said Dewey, J., 'it should appear that [the individual defrauded] had also violated the statute, that would not justify the defendants. If the other party had also subjected himself to a prosecution for a like offense, he also may be punished. This would be much better than that both should escape punishment because each deserved it equally.' And this view accords with the general spirit of the criminal law, wherein the fault of one man is not received in excuse for that of another; while the New York doctrine would introduce a well-known principle of civil jurisdiction into a system of laws to which it is alien": 2 Bishop's Crim. Law, 7th ed., sec. 469.

Finding this conflict in the authorities, we are left free to decide the question propounded solely upon principle.

In our opinion the conclusion reached by Mr. Bishop is supported by the better reasons. The primary object of punishment is the suppression of crime; and where both the prosecutor and defendant have violated the law, it is better that both be punished than that the crime of one should be used to shield the other.

When the plaintiff in a civil action is shown to have been guilty of a wrong in the particular matter about which he complains, he cannot ordinarily recover. But there is little chance to apply this rule to criminal prosecutions conducted by the state, the person defrauded being, at most, a prosecuting witness in the case, and not a party to the proceeding.

The language of our statute is plain. The false pretenses charged in this case are embraced within its express terms, and we are not in favor of sanctioning a rule that will permit offenders to escape by showing that another should also be punished. The petitioner's application to be discharged will therefore be denied, and the prisoner remanded.

CRIMINAL LAW — FALSE PRETENSES. — "To induce a man who is cheated to think that he is cheating some one else, that does not prevent those who use that device from being amenable to punishment": Note to *People v. Richards*, 51 Am. Dec. 88. A conspiracy to obtain money under false pretenses, to be punishable as a crime, must be against an innocent person: *State v. Crowley*, 41 Wis. 271; 22 Am. Rep. 719.

FALSE PRETENSES. — For a general discussion of the law relating to the crime of obtaining money or goods under false pretenses, see extended note to *Barton v. People*, *post*, pp. 378-392.

CARTER v. CITY OF DURANGO.

[16 COLORADO, 534.]

OFFICE AND OFFICERS — REMOVAL OF MUNICIPAL OFFICER, WHEN DISCRETIONARY. — When the tenure of a municipal office is at the pleasure of the appointing body, its power to remove is discretionary, and may be exercised without notice or hearing.

OFFICE AND OFFICERS — AUTHORITY OF CITY COUNCIL TO REMOVE OFFICER IS QUASI JUDICIAL. — The city council is primarily a legislative and administrative body, but it may be clothed with *quasi* judicial authority in connection with removals from municipal offices.

OFFICE AND OFFICERS — POWER OF CITY COUNCIL TO REMOVE OFFICER. — The possession or exercise of judicial power by the city council is not a prerequisite to its authority to remove all its officers. The possession of such power is only necessary in cases of removal from offices which are of the essence of the corporation, and which can only take place for cause, upon notice and investigation, with opportunity to be heard. Its

possession by the council is not necessary in cases of removal from office to which the occupant is appointed at the pleasure of the council.

OFFICE AND OFFICERS — REMOVAL OF MUNICIPAL OFFICER. — THE MOTIVES ACTUATING city councilmen in removing an officer from an office, the tenure of which is at its pleasure, are not ordinarily subject to judicial inquiry, and in the absence of fraud or deception, courts will not interfere with the declaration of discretionary municipal pleasure by the council.

OFFICE AND OFFICERS — POWER OF CITY COUNCIL TO REMOVE FROM OFFICE CANNOT BE CURTAILED BY ORDINANCE. — It is not within the power of a municipal corporation, by ordinance or by-law, either to extend or restrict the discretionary authority conferred on the city council by statute in the matter of the removal of municipal officers.

O. S. Galbreath and William E. Beck, for the petitioner.

Russell and McCloskey, and Wilson and McCloskey, for the respondents.

HELM, C. J. Carter was duly elected, by the city council, police magistrate of the city of Durango. While engaged in the discharge of his duties, the council, by resolution, removed him and appointed a successor. The present proceeding is brought to quash or annul the action of the council in the premises, upon the ground that such action was without jurisdiction.

Under the statute existing at the time of the proceedings recited in the record, the police judge or magistrate, whose appointment was optional with and made by the city council, held his office during the "pleasure" of that body: Mills's Ann. Stats., sec. 4504. When the tenure of a municipal office is at the pleasure of the appointing body, the power to remove is discretionary, and "may be exercised without notice or hearing": 1 Dillon on Municipal Corporations, 3d ed., sec. 250.

Counsel for petitioner ably and ingeniously argue that the statutory provision above mentioned, subjecting the police magistrate's incumbency to the "pleasure" of the council, does not correctly indicate the intention of the legislature; that it was adopted by inadvertence or mistake while attempting to amend otherwise the section in which it occurs. Some of the reasons advanced are plausible, and may be sustained by the rules of construction relied on. But without specifically considering either the reasons or rules in question, it is sufficient for us to say that more controlling, and at least equally pertinent, principles of statutory interpretation forbid our acceptance of counsel's theory. The provision must be regarded as in full force and binding upon the judiciary.

The city council is primarily a legislative and administrative body. Its powers and duties are not essentially judicial. In *People v. District Court*, 6 Col. 534, a doubt was expressed as to whether, under the constitution, the council could be invested with judicial authority. We there held, in effect, that an investigation of charges preferred against the city solicitor, with a view solely to removal from office, was not a judicial proceeding. We are now inclined to say that while the action in question was not an exercise of ordinary judicial power, it might have been termed *quasi* judicial. Moreover, since that opinion was written, the limitation upon legislative discretion in regard to the lodgment of judicial power has been modified by constitutional amendment: Mills's Ann. Const., sec. 373. And whatever foundation for doubt may have formerly existed, there is no question but that the city council may now be clothed with at least *quasi* judicial authority in connection with removals from municipal offices.

But it does not follow that the possession or exercise of judicial power is a prerequisite to all such removals. A broad distinction in this regard is recognized by the authorities between those offices which are of the essence of the corporation and those which are not. For instance, an alderman can only be removed upon notice and investigation, with opportunity to be heard in his defense: *Board of Aldermen v. Darrow*, 13 Col. 460; 16 Am. St. Rep. 215, and citations; while an officer whose appointment is optional with and made by the council, and who holds at its pleasure, may, as we have seen, be summarily removed without notice or hearing. In the former case, a cause for motion must exist, and the proceeding, possessing many of the features of judicial action, is properly characterized as *quasi* judicial; in the latter case, there need be no cause for removal, save the arbitrary will of the council, and the expression of that will is destitute of judicial characteristics.

When, as in the case at bar, the tenure of office is during the pleasure of the council, the subject of motion is almost entirely within the discretion and control of that body. The motives actuating councilmen in the premises are not ordinarily subject to judicial inquiry. And universally, we believe, in the absence of deception or fraud, courts decline to interfere with the declaration of discretionary municipal pleasure by the council: *Hudson v. Denver*, 12 Col. 157.

The fact that an ordinance had been adopted by the mu-

municipal authorities of Durango providing for the preferment of charges, and a hearing upon notice preliminary to removals from office, does not alter the result to which the foregoing conclusions would lead. The council were not bound to supply any specific procedure for the removal of police magistrates. The ordinance in question is general, relating to a number of offices, in some of which removals are not discretionary with that body. It reads: "Any officer named above may be removed by a majority of the city council for incompetency or dereliction or violation of duty whenever the council think the interests of said city require such removal; provided, that no officer shall be removed as aforesaid until he shall have notice of such intent of removal, and the charge or charges preferred against him served on him by the city clerk, and an opportunity to exculpate himself before the city council."

We cannot assume that in adopting this ordinance the councilmen intended to curtail their statutory power of removing at pleasure, and limit themselves to removals for the specified causes alone. Besides, it is extremely doubtful if such intent, had it existed, could be thus given any force or effect. For it is not within the power of a municipal corporation, by ordinance or by-law, either to extend or restrict the authority conferred by statute: 1 Dillon on Municipal Corporations, sec. 317.

It will be observed that the procedure specified in the ordinance above mentioned is limited to removals for "incompetency" or "dereliction or violation of duty." We are not apprised by the record that Carter was removed upon either of these grounds. The sole action through which his removal was ultimately accomplished was the following: "Resolved, that it is no longer the pleasure of the city council of the city of Durango that Robert Carter act in the capacity of police magistrate of said city of Durango. Wherefore be it resolved, that the said Robert Carter be, and he is hereby, removed from the said office of police magistrate."

We might, perhaps, with the learned judge before whom this precise question was first raised, declare that the ordinance cannot be permitted, under any circumstances, to control the manner of expressing the "pleasure" vested by statute in the city council. But it is sufficient for us to say that the removal may have been upon grounds not mentioned in the ordinance; and if such were the case, the question of

duty or obligation to follow the prescribed procedure does not fairly arise.

The rule to show cause must be discharged.

OFFICE AND OFFICERS — REMOVAL OF MUNICIPAL OFFICER. — The legislature may confer upon the common council of a city the power to remove an officer without cause, but such power must be expressly conferred: *Hallgren v. Campbell*, 82 Mich. 255; 21 Am. St. Rep. 557, and note. An officer, before he can be ousted by other than the appointing power, is entitled to a hearing: *Board of Comm'rs v. Johnson*, 124 Ind. 145; 19 Am. St. Rep. 88, and note. In the absence of constitutional or legislative prohibition, the power of removal is incident to the power of appointment of officers: *Newsom v. Cocke*, 44 Miss. 352; 7 Am. Rep. 686; *State v. Douglass*, 26 Wis. 428; 7 Am. Rep. 87, and note. *Contra* to the doctrine of the leading case, see *Board of Aldermen v. Darrow*, 13 Col. 460; 16 Am. St. Rep. 215, and extended note.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

DILLABY v. WILCOX.

[60 CONNECTICUT, 71.]

STATUTE OF FRAUDS — PROMISE OF EXECUTOR OR ADMINISTRATOR. — That portion of the statute of frauds of Connecticut declaring that no civil action shall be maintained upon any agreement whereby to charge any executor or administrator upon a special promise to answer charges out of his own estate, unless such agreement, or some memorandum thereof, be in writing, and signed by the party to be charged therewith or his agent, refers to promises made by an executor or administrator to answer out of his own estate for some liability existing against the decedent in his lifetime.

STATUTE OF FRAUDS — PROMISE TO ANSWER FOR THE DEBT OF ANOTHER. — If a person, not before liable, agrees to pay the debt of a third person, and as a part of the arrangement the original debtor is discharged from his indebtedness, the agreement is not within the statute of frauds. It is otherwise if the original debtor continues liable.

STATUTE OF FRAUDS. — IF THE PERSON UNDERTAKING TO PAY THE DEBT OF ANOTHER RECEIVES PROPERTY OR FUNDS of the debtor for the purpose, his promise is, in no proper sense, an undertaking to answer for the debt of another, but an undertaking to apply the property or funds to such payment.

STATUTE OF FRAUDS. — A PROMISE BY AN ADMINISTRATOR TO PAY CERTAIN TAXES if the tax collector would forbear to levy upon chattels on which the estate represented by the administrator had a mortgage, but upon which the taxes were not a lien, is a promise to answer for the debt of another, and therefore within the statute of frauds.

S. Lucas, for the appellant.

J. Halsey and W. A. Briscoe, for the appellee.

SEYMOUR, J. The plaintiff in this case was collector of taxes for the town, city, and central school district of Norwich, and had in his hands warrants for the collection of taxes assessed

in favor of each of them upon property of one Gordon Wilcox. The defendant and her mother were the administrators of the estate of William Wilcox, deceased, and, as such, held a mortgage on certain personal property of Gordon Wilcox, consisting of printing-presses and material in the possession of and used by him in Norwich.

The plaintiff was unable to procure payment of the taxes from Gordon Wilcox, and applied to the defendant for the payment thereof, and threatened to levy upon said mortgaged property unless they were paid. The defendant promised the plaintiff that if he would forbear to levy upon the property she would pay the taxes as soon as the property should be sold under the judgment of foreclosure which she and her mother, as administrators aforesaid, had obtained upon the mortgage. The plaintiff, in consideration of this promise of the defendant, promised to forbear, and did forbear, to levy upon the property, and the same was sold under the judgment of foreclosure, and was bid in for the defendant.

The defendant, after the sale, refused to pay the amount of the taxes to the plaintiff, and they have not been paid.

The suit, it will be observed, is against Mrs. Wilcox personally. No pleadings subsequent to the complaint appear to have been filed, but the finding shows that the defendant denied that she made the promise upon which the action was brought. She also claimed that the promise declared on was within the statute of frauds, and, not being in writing, no recovery could be had upon it, and further, that there was no consideration for the promise, and asked the court so to rule, but the court refused so to do, and rendered judgment for the plaintiff, from which the defendant appeals.

Was the promise, which the court finds was made, within the statute of frauds?

The statute provides that "no civil action shall be maintained upon any agreement whereby to charge any executor or administrator upon a special promise to answer damages out of his own estate, or against any person upon any special promise to answer for the debt, default, or miscarriage of another, . . . unless such agreement, or some memorandum thereof, be made in writing, and signed by the party to be charged therewith, or his agent": Gen. Stats., sec. 1366.

The first clause has reference to promises by an executor or administrator to answer out of his own estate for a claim against his decedent,—some liability resting upon the execu-

tor or administrator strictly in his representative character, and which, but for the promise, he would have been liable to discharge only in due course of the administration of the estate. To change the expression, this clause of the statute covers a special promise made by the executor or administrator to pay, out of his own estate, what (being the legal representative of the party originally liable) he is already, in that representative capacity, under a liability to pay to the extent of the property which has come into his hands. "The particular object of this provision," says a recent writer upon the statute, "was evidently to guard executors and administrators against being held to a personal liability to pay debts, legacies, or distributive shares in consequence of a willful or mistaken perversion of expressions of encouragement which they may have used in conversation with claimants, and which were not justified by the ultimate result of administration of the assets in their hands": Throop on Verbal Agreements, 87. However that may be, the suggestion illustrates the nature of the promise referred to in this section. The promise proved, in the case before us, was to answer for the debt or default of Gordon Wilcox, a third party, and is a promise to which that clause has no reference. The suggestion that the defendant, if compelled to pay the judgment, can repay herself out of the assets of the estate, does not tend to bring the promise within the clause. Most of the personal obligations of an executor contracted in the course of his administration, says the court in *Chambers v. Robbins*, 28 Conn. 550, are proper charges against the estate in the final settlement of his account, but they are none the less his private debts, for which he is alone liable in his private capacity. In *Pratt v. Humphrey*, 22 Conn. 317, a leading case upon this clause, the promise was to pay a debt due from the estate of which the defendants were administrators,—an entirely different case from the one at bar.

The second clause of the statute relates to the special promise of any person to answer for the debt, default, or miscarriage of another. An immense amount of litigation has arisen over its construction. It is impossible to reconcile the decisions which have been made under it. Almost any theory of its scope and meaning can find some case to support it. The most careful text-writers have acknowledged their inability to find anything like uniform rules of construction in the conflicting decisions which have been rendered. It has

even been stated that the law upon it is in a state of hopeless confusion. It is all the more satisfactory, therefore, that our own court seems, so far, at least, as the points involved in this case are concerned, to have found and adopted a rule which has proved satisfactory, — a rule which, we think, substantially settles the question before us.

The promisor, to briefly restate the facts, was one of the administrators of William Wilcox's estate, — a fact, as we have seen, of no significance unless to show a motive for her promise, founded on a fancied advantage to the estate of her decedent. The promisee was the collector of taxes, threatening to levy on personal property upon which he had no lien, and on which William Wilcox's estate held a mortgage. The levy, if made, would, of course, have been subject to such mortgage. The party for whose debt or default the promise to answer was made was a delinquent tax-payer, who, after the promise, continued liable for the taxes until paid. The suit, then, is by a tax collector against a defendant who, in consideration of the plaintiff's forbearance to levy for a third person's tax on personal property on which an estate of which she was one of the administrators had a mortgage, promised to pay taxes due to Norwich town and city, and a school district of the town, from said tax-payer, the mortgagor of the property.

In *Packer v. Benton*, 35 Conn. 343, 95 Am. Dec. 246, it is held that "where a person, not before liable, agrees to pay the debt of a third person, and as a part of the arrangement the original debtor is discharged from his indebtedness, the agreement is not within the statute of frauds; otherwise if the original debtor continues liable."

We shall quote somewhat extensively from that case, as the rule therein established has subsequently been applied in *Pratt's Appeal*, 41 Conn. 191, and in *Gridley v. Sumner*, 43 Conn. 16, and is, as already suggested, decisive of the case now before us. Judge Butler writes the opinion, and after contrasting the facts then before the court with those in *Clapp v. Lawton*, 31 Conn. 95, he says (p. 349): "Here the contract was tripartite between the debtor, a creditor, and a third person; and it contemplated the discharge of the original debtor, and a new obligation by the third party, to the particular creditor. Such new obligations and indebtedness is not within the statute of frauds. In *Turner v. Hubbell*, 2 Day, 457, 2 Am. Dec. 115, the distinguished counsel for the defendant in

error deduced from the cases which had then occurred under this branch of the statute the following definition of the promise intended by it, to wit: 'An undertaking by a person, not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made is at the same time liable'; and it was adopted by the court. With a single modification, that definition furnishes as perfect a test as has ever been, or we think can be, devised. . . . The foregoing definition may be modified, therefore, so as to read: 'An undertaking by a person, not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made, continues liable.' Applying this test to the case in hand, it is obvious that the objection of the defendant ought not to prevail. It was the purpose and effect of the tripartite contract in question to discharge the original debtors in consideration of their giving up their property to the defendant, as well as to operate the defendant, in consideration of that discharge. . . . As the original debtors did not continue liable, an essential element of the test was wanting, and the contract was not within the statute."

In the case now before us, all the essential elements of the test are present and bring the promise within the statute.

The case of *Packer v. Benton*, 35 Conn. 343, 95 Am. Dec. 246, does not discuss the questions which might arise in that class of cases where the defendant, for his own use and advantage, procures from the plaintiff the surrender, release, or waiver of a lien or security which the latter holds for a debt due him, upon the promise to pay the debt. In such cases it has been held, in a large number of cases, that the promise is not within the statute, though the original debt is not discharged, on the ground that the transaction amounts to a purchase from the creditor of such lien or security for a price which is the amount of the original debt, and that the relinquishment of the lien or security has inured to the defendant's benefit. In the leading case of *Fullam v. Adams*, 37 Vt. 391, it is held that "a verbal promise to pay the debt of another, where the original debt still subsists, is never legally binding, except where the promisor has received the funds or property of the debtor for the purpose of being so applied, so that an obligation or duty rests upon him, as between himself and the debtor, to make such payment, whereby his promise, though in form to pay the debt of another, is in fact a promise to per-

form an obligation or duty of his own." Poland, C. J., who writes the opinion, says (p. 397) that the cases which decide that where a creditor holds a security and surrenders it to a third person, for his benefit, upon his promise to be answerable for the debt, stand really upon the same substantial principle.

It is stated in the text of the American and English Encyclopædia of Law, *in loco*, that in a large and increasing number of the states of the Union the promise, although made upon a new consideration of benefit to the promisor, is held to be collateral, whatever the intent of the parties, if the original liability remains; and a very large number of authorities are cited in support of the proposition.

It is to be noticed, as illustrating the difference in construction already alluded to, that in a recent case in New York (*White v. Rintoul*, 108 N. Y. 222), it is stated, though under a *semble*, that a promise to pay a debt of another, antecedently contracted, where the primary debt still subsists, is original, and so valid within the statute of frauds, although not in writing, when it is founded on a new consideration moving to the promisor and beneficial to him, and when by the promise he comes under an independent duty of paying, irrespective of the liability of the principal debtor. Curiously enough, this intimation of an opinion—for it amounts to nothing more as reported—is made in a case where the defendant was a creditor of a firm, and was secured by a chattel mortgage. The plaintiff was the holder of two notes of the firm, which were nearly matured. The defendant disclosed the fact that he held the mortgage, and promised to pay the notes if the plaintiff would forbear for a time. It was held that the promise was within the statute. The court says: "The plaintiff contends that the defendant had a direct personal interest in procuring a forbearance to sue the firm, which he explains in his brief by saying that 'if the plaintiff pressed the collection of his notes and did not wait till the then next summer, the defendant would lose his money, which had been loaned to the firm.' But I do not discover a single fact in the case which tends to any such conclusion. . . . It was a fear without a foundation; a state of mind, and not a result of existing facts seen in their legal bearing. Delay on the part of the plaintiff is not shown to have been of the slightest consequence to the interest of the defendant." No more do we see in the case before us a single fact which shows that a levy by the collector, sub-

ject, as it must have been, to the mortgage, could have injured the defendant or the estate she represented. If she thought so, "it was a state of mind, and not a result of existing facts seen in their legal bearing"; and the decision of the case from which we are quoting seems to unmistakably favor her defense, though the *dictum* seems adverse.

It is said in Browne on the Statute of Frauds, sec. 214 e, that "the mere passing of a new and independent valuable consideration between the plaintiff and defendant does not take the case out of the operation of the statute; and so far as some of the decisions depend upon the contrary, they cannot be regarded as law. Every contract of guaranty requires a valuable consideration moving from the party to whom the guaranty is given. There can be no sensible distinction made between 'new and independent' considerations and any other valuable considerations; and the general proposition that 'a new and independent consideration moving between the parties to the contract of guaranty' takes it out of the statutes simply nullifies the statute. The distinction is between a mere valuable consideration for the defendant's promise of guaranty, and that transfer of value which creates an original obligation on the part of the defendant, the measure of which is, by the agreement of the parties, the defendant's payment of the third party's debt."

It was suggested that the promise relied on was an original undertaking. We cannot look upon it as such within the proper meaning of that word. It is a new promise to pay the already existing debt of a third party. The court say in *Mallory v. Gillett*, 21 N. Y. 412: "The words 'original' and 'collateral' are not in the statute of frauds; but they were used at an early day, the one to mark the obligation of a principal debtor, the other that of the person who undertook to answer for such debt. This was no doubt an accurate use of language; but it has sometimes happened that, by losing sight of the exact ideas represented by these terms, the word 'original' has been used to characterize any new promise to pay an antecedent debt of another person. Such promises have been called original because they are new; and then, as original undertakings are agreed not to be within the statute of frauds, so these new promises, it is often argued, are not within it. If the terms of the statute were adhered to, or a more discriminating use were made of words not con-

tained in it, there would be no danger of falling into errors of this description."

Where the person undertaking to pay the debt of another receives property or funds of the debtor for the purpose, his promise is in no proper sense an undertaking to answer for the debt of another, but an undertaking to apply the property or funds to such payment. The undertaking becomes then an independent one, and the continuing obligation of the debtor becomes in a sense collateral to it. Whenever the new promise is merely collateral to the original debt, it must be in writing, whatever the consideration, and it remains collateral so long as the original debt still subsists as the principal debt.

The decision at which we have arrived makes any discussion of the other questions presented on the record superfluous.

There is error in the judgment appealed from, and it is reversed.

STATUTE OF FRAUDS — PROMISE TO ANSWER FOR THE DEBT OF ANOTHER. — A promise to a debtor to pay his debt to a third person is not within the statute of frauds: *Ware v. Allen*, 64 Miss. 545; 60 Am. Rep. 67; *Goetz v. Foos*, 14 Minn. 265; 100 Am. Dec. 218, and note. Where a person, not before liable, agrees to pay the debt of a third person, and as a part of the agreement the original debtor is discharged from his indebtedness, the agreement is not within the statute of frauds: *Packer v. Benton*, 25 Conn. 343; 95 Am. Dec. 246, and extended note.

REGAN v. NEW YORK AND NEW ENGLAND RAIL-ROAD COMPANY.

[60 CONNECTICUT, 124.]

INSURANCE — RIGHT TO HAVE THE PROCEEDS OF, APPLIED IN MITIGATION OF DAMAGES. — If a railway corporation is by statute made liable to the owner of property for damages resulting to him from its destruction by fire communicated by a locomotive-engine, it is not entitled to have moneys received from an insurance, effected by him on the same property, applied in mitigation of damages. On the contrary, the owner of the property may be regarded as holding his claim against the railway company in trust for the insurer.

DAMAGES RECOVERABLE FOR AN INJURY ARE NOT LIMITED BY THE FACT THAT THE PERSON INJURED HAS RECEIVED SOME COMPENSATION for the injury from another than the one liable in damages, wholly independent of any act of procurement of the latter, nor is it material that the latter was not guilty of any wrong or negligence, if the law has made him liable for the injury, in their absence.

SUBROGATION. — When one person discharges an obligation which primarily rests upon another, he should be subrogated to the place of the injured party or the creditor in respect to the party who is primarily liable; nor will the fact that the latter has not been guilty of any negligence or wrong-doing enable him to escape the demands of the party insisting upon the right to subrogation.

DAMAGES — INTEREST, WHEN ALLOWABLE IN ESTIMATING. — When one is liable for the destruction of property having a market value easily susceptible of proof, the damages recoverable by him are to be ascertained by adding to the market value of the property at the time of its destruction interest on the amount of such value to the date of judgment.

E. D. Robbins, for the appellant.

A. P. Hyde and C. Phelps, for the appellee.

LOOMIS, J. This is a complaint to recover damages for the loss of goods belonging to the plaintiff, which on the thirteenth day of July, 1889, were destroyed by a fire communicated by a locomotive-engine belonging to and in the use of the defendant corporation.

The action is predicated upon section 3581 of the General Statutes, which provides as follows: "When any injury is done to a building or other property of any person, by fire communicated by a locomotive-engine of any railroad company, without contributory negligence on the part of the person entitled to the care and possession of the property injured, the said railroad company shall be held responsible in damages to the extent of such injury to the person so injured; and every railroad company shall have an insurable interest in the property for which it may be so held responsible in damages along its route, and may procure insurance thereon in its own behalf." The defendant suffered a default, and a hearing in damages was had before the court.

The court found all the facts essential to a recovery of compensatory damages, and assessed as such damages the sum of \$13,091.95, and rendered judgment for the plaintiff to recover that sum of the defendant, and his cost.

Upon the hearing, the counsel for the defendant inquired of the plaintiff, as a witness, if he had not received from insurance companies some compensation for the damages to said goods by said fire. This was objected to by the plaintiff and excluded by the court. Was this ruling erroneous?

In the first place, if we assume that, under proper pleadings, the defendant might be allowed a reduction equal to the amount of insurance collected by the plaintiff on the goods

destroyed, we do not think it admissible as the pleadings were at the time of the hearing.

It is true that in this case there was no answer, but a default, which admitted the allegations of the declaration to be true; but an admission of the truth of the allegations could surely give no greater latitude of proof upon the subject of the damages than a denial. Both parties must be confined to such questions of damage and such matters of aggravation or mitigation as would naturally arise from the facts stated in the complaint. The plaintiff could not show special or consequential damages not averred and not naturally flowing from the cause of action described; nor could the defendant, on the other hand, have the benefit of a set-off, recoupment, or any other ground for the reduction of damages, depending on some independent transaction between the plaintiff and a third person.

The matter to be proved by the rejected evidence upon the defendant's assumption would be a complete defense except for the default. If it equaled in amount the value of the goods, it would be an absolute bar to the action, otherwise it would be a bar *pro tanto*.

But irrespective of the pleadings, the ruling complained of was clearly right upon the merits of the question. Any other conclusion would seem to us utterly at variance with established principles and sound reason, and contrary to an unbroken line of decisions by the courts of England and the United States.

If the defendant is entitled to have the insurance money deducted from the amount otherwise due, it must be because it owns or has some legal claim to the money. How happens it that the defendant corporation is entitled to this money? Not because it ever paid the premium or any part of it, nor because the policy was obtained for its benefit or upon its request, nor because there is any privity between it and the insurance company. Our own court, in *Connecticut Mut. Life Ins. Co. v. New York etc. R. R. Co.*, 25 Conn. 265, 65 Am. Dec. 571, held that there was no privity between the defendant, whose negligence caused the death of the insured, and the insurance company, who issued the policy on the life of such person, and this position accords perfectly with the law in other jurisdictions.

The defendant, instead of paying anything toward procuring the policy, by its extraordinary use of the dangerous

element of fire in close proximity to the plaintiff's property, rendered it necessary for him to pay a much larger sum to obtain his insurance than would otherwise have been required.

How, then, can the defendant claim, as it does, the exclusive benefit of the insurance? It came to the plaintiff from a collateral source, wholly independent of the defendant, and which, as to him, was *res inter alios acta*. The defendant, in our judgment, has no more claim to the insurance money than it would have to money obtained upon a subscription paper which the friends of Regan may have procured to make good his loss. How can the defendant make any distinction between money raised voluntarily after the loss, and that obtained from a contract of indemnity to which it was no party, and had paid no part of the consideration?

The statute upon which the action is founded justly imposes an absolute primary liability on the defendant for having caused the loss. But the ruling which the defendant asked for would completely nullify the statute as applicable to such a case as this, by practically imposing the primary obligation on the insurer, who is innocent, and allowing the defendant, who caused the loss, and who alone could have prevented it, to go entirely free, at least to the extent of the insurance; for the insurer, having paid the money due the insured, could not get it back from him, and of course the insured, after such deduction from his damages, would have no remaining right to which the insurer could be subrogated to recover the money back again from the defendant.

If the principles that underlie the defendant's position are correct, had the loss been paid in full in ignorance of the fact that the plaintiff had obtained insurance, the defendant might bring a suit against the plaintiff to recover the money so paid; or had the money due on the policy not been paid, the defendant, after paying the loss in full, could intervene to prevent the amount due on the policy from being paid to the insured, or any other than itself. What a strange subrogation that would be, to put the party who caused the loss in the place of the insured, to enforce the contract between the latter and his insurer! And what a strange revolution would be made in the relation of the parties, were we to adopt the defendant's contention! It has hitherto been established by a line of decisions reaching backward more than a century, and substantially unbroken by dissent, that there is no priv-

ity in such cases between one made primarily liable for such a loss and an insurance company; that the liability of the insurer is merely secondary; that the insurer's position is practically that of a surety; that insurance is personal, and does not inure to the benefit of one not a party thereto; and that where the insurer has indemnified the owner of the goods lost, he is entitled to be subrogated to all the means of indemnity which the owner held against the party causing the loss and primarily liable therefor.

The true relations of the parties and the law on the subject under discussion are very clearly shown by the opinion of the court, delivered by Chief Justice Shaw, in the case of *Hart v. Western R. R. Co.*, 13 Met. 99, 46 Am. Dec. 719, which was an action on a statute identical with our own, in that it provided that when any injury was done to a building of any person by fire communicated by a locomotive-engine of a railroad corporation, the corporation should be responsible in damages to the person so injured, and such liability, as in the case of our statute, was irrespective of any actual proof of negligence. The plaintiff's house was destroyed by a fire communicated by a locomotive-engine of the defendants, and the underwriters paid to the owner of the house the amount of his loss, and it was held that such payment did not bar the owner's right to recover of the railroad corporation, and that the owner, by receiving payment of the underwriters, became trustee for them, and they could prosecute the suit against the railroad corporation in the name of the owner, who could not even release the railroad corporation so as to affect the rights of the underwriters to recover. In delivering the opinion, Chief Justice Shaw said: "Railroad companies acquire large profits by their business. But their business is of such a nature as necessarily to expose the property of others to danger. . . . The manifest intent and design of this statute, we think, and its legal effect, are, upon the considerations stated, to afford some indemnity against this risk to those who are exposed to it, and to throw the responsibility upon those who are thus authorized to use a somewhat dangerous apparatus, and who realize a profit from it. . . . Now, when the owner, who *prima facie* stands to the whole risk, and suffers the whole loss, has engaged another person to be at that particular risk for him, in whole or in part, the owner and the insurer are, in respect to that ownership and the risk incident to it, in effect, one person, having

together the beneficial right to an indemnity provided by law for those who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common benefit, to the assurer. It is one and the same loss, for which he has a claim of indemnity, and he can equitably receive but one satisfaction. So that, if the assured first applies to the railroad company, and receives the damages provided, it diminishes his loss *pro tanto*, by a deduction from and growing out of a legal provision attached to and intrinsic in the subject insured. The liability of the railroad company is, in legal effect, first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability. The assured may first apply to whichever of these parties he pleases; to the railroad company by his right at law, or to the insurance company in virtue of his contract. But if he first applies to the railroad company, who pay him, he thereby diminishes his loss by the application of a sum arising out of the subject of the insurance, to wit, the building insured, and his claim is for the balance. And it follows, as a necessary consequence, that if he first applies to the insurer, and receives his whole loss, he holds the claim against the railroad company in trust for the insurers. Where such an equity exists, the party holding the legal right is conscientiously bound to make an assignment in equity to the person entitled to the benefit; and if he fails to do so, the *cestui que trust* may sue in the name of the trustee, and his equitable interest will be protected. But we think this position is exceedingly well sustained by authorities."

And if the principles were so well sustained then, in 1847, when that opinion was written, they are now, after the lapse of more than forty years, still more strongly supported: *Mason v. Sainsbury*, 3 Doug. 61; *Clark v. Hundred of Blything*, 3 Dowl. & R. 489; 2 Barn. & C. 254; *Yates v. White*, 4 Bing. N. C. 272; *Randal v. Cochran*, 1 Ves. Sr. 98; *Commercial Union Assur. Co. v. Lister*, L. R. 9 Ch. 483; *Propeller Monticello v. Mollison*, 17 How. 152; *Hall v. Railroad Cos.*, 13 Wall. 367; *Clark v. Wilson*, 103 Mass. 219; 4 Am. Rep. 532; *Hayward v. Cain*, 105 Mass. 213; *Harding v. Town of Townshend*, 43 Vt. 536; 5 Am. Rep. 304; *Monmouth Co. Mut. Fire Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107; *Weber v. Morris etc. R. R. Co.*,

35 N. J. L. 409; 10 Am. Rep. 253; 36 N. J. L. 213; *Collins v. New York Central R. R. Co.*, 5 Hun, 503; *Connecticut Fire Ins. Co. v. Erie R'y Co.*, 10 Hun, 59; *Merrick v. Brainard*, 38 Barb. 574; *Althorf v. Wolfe*, 22 N. Y. 355; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Carpenter v. Eastern Transportation Co.*, 71 N. Y. 574; *Briggs v. New York Central etc. R. R. Co.*, 72 N. Y. 26; *Gales v. Hailman*, 11 Pa. St. 515; *Rockingham Ins. Co. v. Boshier*, 39 Me. 253; 63 Am. Dec. 618; *Disbrow v. Jones*, Harr. (Mich.) 48; *Sherlock v. Alling*, 44 Ind. 184; *Swarthout v. Chicago etc. R'y Co.*, 49 Wis. 625; *Pratt v. Radford*, 52 Wis. 114; *Honore v. Lamar Fire Ins. Co.*, 51 Ill. 414.

In 1 Sutherland on Damages, 242, it is said: "There can be no abatement of damages on the principle of partial compensation received for the injury, where it comes from a collateral source, wholly independent of the defendant, and is as to him *res inter alios acta*. A man who was working for a salary was injured on a railroad by the negligence of the carrier; the fact that the employer did not stop the salary of the injured party during the time he was disabled was held not available to the defendant, sued for such injury, in mitigation. Nor will proof of money paid to the injured party by an insurer or other third person, by reason of the loss or injury, be admissible to reduce damages in favor of the party by whose fault such injury was done. The payment of such moneys not being procured by the defendant, and they not having been either paid or received to satisfy in whole or in part his liability, he can derive no advantage therefrom in mitigation of damages for which he is liable. As has been said by another, to permit a reduction of damages on such agreement would be to allow the wrong-doer to pay nothing, and take all the benefit of a policy of insurance without paying the premium." The same thing, in substance, is said in Wood's Mayne on Damages, p. 155, sec. 114.

In the above quotation, the doctrine of the cases cited is well summarized, and we forbear further citations from the opinions in those cases, except such as bear directly upon the particular point which the defendant makes in this case; for the counsel for the defendant admits the general doctrine as applied to cases where the defendant caused the loss by negligence or some positive wrongful act; but his contention is, that, under our statute, the railroad company and the insurance company are equally innocent in regard to the loss, and therefore the insurance company did not acquire by payment of the amount

insured any right of subrogation as against the defendant corporation. But we think this is an entire misconception of the defendant's true position and of the law relative to this subject.

In the first place, the defendant cannot, in the present posture of this case, say that the loss in question was not occasioned by its own negligence. It is explicitly found that there was no negligence on the part of the plaintiff, but it is not found that there was no negligence on the part of the defendant. In some cases the omission to find negligence would justify the claim that there was no negligence, but this cannot apply to such a case as this, where by law the presumption of negligence arises from the mere fact that the defendant caused the loss. In such cases the burden rests on the defendant to overcome the presumption by showing to the satisfaction of the court that there was no negligence. Section 1096 of the General Statutes provides that "in all actions to recover for any injury occasioned by fire communicated by any railway locomotive-engine in this state, the fact that such fire was so communicated shall be *prima facie* evidence of negligence on the part of the person or corporation who shall, at the time of such injury by fire, be in the use and occupation of such railroad."

It may be said that in the other section of the statutes, upon which the present action is particularly predicated, the railroad company causing the loss is made liable, irrespective of any finding of negligence; and as such fact was immaterial, the defendant ought not to be prejudiced by failing to show that there was no negligence. If, however, the defendant's present contention is correct, that the amount of the damages depends upon the fact of negligence or no negligence, then it is material to the question under consideration, and the defendant must rest under the statutory presumption that the loss was caused by negligence.

But there are other still more satisfactory answers to the objection under consideration. The sole foundation for the defendant's contention rests on the fact that the railroad company and the insurance company, in their relation to the loss, are equally innocent in contemplation of the law. Now, any proper theory of the statute under consideration will utterly exclude such an idea. The theory of the statute is, that as the railroad corporation is privileged, for its own profit, to use, for purposes of rapid locomotion, the dangerous element of

fire in close proximity to adjoining combustible property, and as it alone, through its own agents, who construct and manage its locomotive-engines, has power to prevent the communication of fire to the adjoining property, if fire is communicated from its engines, and the property of another is thereby destroyed, there is legal fault, predicated upon the mere fact of a loss so caused, and the railroad corporation is made absolutely liable to make good the loss to the owner, irrespective of any finding as to negligence. In view of this statute, it seems to us almost preposterous to hold that the defendant who causes the loss is equally innocent with the one who merely issues to the owner of the property an ordinary policy of insurance.

But there is still another independent answer to the point referred to, namely, that the principles established by the authorities render it immaterial whether or not the loss was occasioned by any positively negligent or wrongful act. This is shown, first, by the leading English cases, where the doctrine which we apply to this case originated, and which cases are referred to and cited with approval in all the leading American cases on the subject.

The earliest case on this subject is that of *Mason v. Sainsbury*, 3 Doug. 61, decided in 1782. It was an action against the community known in England as the hundred, — a division of a county, — to recover damages sustained by the demolition of a house by the act of certain rioters in 1780. The plaintiff had an insurance on the house destroyed, which the insurance company (or office, as it is there called) paid without suit, and this action was brought in the name of the plaintiff, with his consent, for the benefit of the insurance company. The judges all agreed that the plaintiff was entitled to recover. Lord Mansfield said: "The office paid without suit, not in ease of the hundred, and not as co-obligors, but without prejudice. It is to all intents and purposes as if it had not been paid. The question then comes to this, Can the owner, having insured, sue the hundred? Who is first liable? If the hundred, it makes no difference; if the insurer, then it is a satisfaction, and the hundred is not liable. But the contrary is evident from the nature of the contract of insurance. It is an indemnity. Every day the insurer is put in the place of the insured. In every abandonment it is so. The insurer uses the name of the insured. The case is clear; the act puts the hundred, for civil purposes,

in the place of the trespassers, and upon principles of policy, as in the case of other remedies against the hundred; and I am satisfied that it is to be considered as if the insurers had not paid a farthing." Buller, J., said it was to be treated as an indemnity, in which the principle is, that the insurer and the insured are as one person, and the paying by the insurer, before or after, can make no difference.

In *Clark v. Inhabitants of Hundred of Blything*, 3 Dowl. & R. 489, decided in 1823, it was held that the owner of stacks of corn, maliciously destroyed by fire set by some persons unknown, may maintain an action against the hundred on the act of 9 Geo. I., c. 22, although he has previously received the full amount of his loss from an insurance office. Abbott, C. J., in delivering the opinion, said he could not entertain a doubt as to the propriety of the decision in *Mason v. Sainsbury*, 3 Doug. 61, and added: "The intention of the legislature in passing this and other statutes of the same nature was twofold: to render the inhabitants of hundreds vigilant for their own sake, as well as that of the public, by making them interested in the prevention of offenses, and where that is impossible, in the apprehension and conviction of offenders. . . . With respect to the question whether it is competent for the defendants to set up in their own defense a contract made between third persons, it seems to me that the principle of the act fully justifies the decision of the former case, and that we should be acting in violation of the principle if we were to disturb the present verdict."

The analogy between the cases just cited and the one at bar, particularly as they stand related to the question under consideration, would seem to be nearly perfect. By sundry statutes passed by Parliament at different times, the particular community known in England as the hundred was made liable, in the cases specified, to make good the loss sustained by individuals within the hundred, by robbery, riot, and other violent crimes committed within their jurisdiction. The community might be ever so vigilant to prevent, discover, and punish crime, and might leave nothing whatever undone which it was their legal or moral duty to do, and yet they would be liable just the same as if actual culpability were proved. The only distinction that can be made between these cases and the one at bar will render them still stronger as authorities against the position of the defendant; for it is manifest that the hundred had far less power in fact to pre-

vent the commission of the crimes referred to, and the losses therefrom, than a railroad corporation with us has to prevent the communication of fire to adjoining property, and yet the statutes referred to imputed to the hundred, upon the mere happening of loss from the commission of the crimes referred to, a legal fault or wrong which made them absolutely liable to make good the loss. So our statute conclusively fixes a legal fault or wrong upon a railroad corporation that fails to so construct and manage its locomotive-engines as absolutely to prevent loss of property of another from fire communicated by it in the way and manner specified, and makes it primarily liable to make good the loss.

The statutes in the case of the hundred were designed to make the inhabitants vigilant to prevent and punish crime. So one purpose of our statute was to make railroad corporations more careful and vigilant to prevent loss from fire; but another, and perhaps more controlling, purpose was to place the loss, should it happen, where justice required it to be placed, namely, on the one who caused the loss, while exercising the privilege and making a profit out of the hazard which it thereby imposed as a burden on the adjoining property, and this furnishes most ample vindication of our statute, whatever we may think of the statutes concerning the hundred.

In further contravention of the defendant's position, we might cite all those cases where the doctrine under consideration was applied to carriers, who are by law made absolutely responsible for the safe delivery of goods intrusted to them, with the single exception of losses arising from the act of God, irrespective of any negligence or positively wrongful act. The principle of these cases is stated and approved in *Sheldon on Subrogation*, sec. 229.

We will cite two of this class of cases, where the precise point now made was raised and decided adversely to the defendant by courts of as great ability as any in the United States. The first case is that of *Hall v. Railroad Cos.*, 13 Wall. 367.

The head-note is as follows: "An insurer of goods, consumed and totally destroyed by accidental fire, in course of transportation by a common carrier, is entitled, after he has paid the loss, to recover what he has paid by suit in the name of the assured against the carrier. It is not necessary, in order to sustain such a suit, to show any positive wrongful act by the

carrier." Mr. Justice Strong, in delivering the opinion of the court, said: "It is too well settled by the authorities to admit of a question, that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty. Standing thus, as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity." Then, after citing several pertinent cases, the opinion proceeds: "It has been argued, however, that these decisions rest upon the doctrine that a wrong-doer is to be punished; that the defendants against whom such actions have been maintained were wrong-doers; but that in the present case the fire, by which the insured goods were destroyed, was accidental, without fault of the defendants, and therefore they stood, in relation to the owner, at most, in the position of double insurers. The argument will not bear examination. A carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer, and even greater, but its nature is not the same. His contract is not one for indemnity, independent of the care and custody of the goods. . . . In all cases, when liable at all, it is because he is proved, or presumed to be, the author of the loss."

The case of *Gales v. Hailman*, 11 Pa. St. 515, is equally in point. In a very able opinion by Gibson, C. J., it was held that "a shipper who has received from his insurers the part of the loss insured against may sue the carrier on the contract of bailment, not only in his own right for the unpaid balance due to himself, but as trustee for what has been paid by the insurer, and upon the trial the court will restrain the carrier from setting up the insurer's payment of his part of the loss as satisfaction for so much of the demand at law.

The carrier cannot, in case of his own liability, call upon the insurer for contribution upon the principle of double insurance; for the carrier is not an insurer, though he is sometimes inadvertently called so."

The only case cited by the counsel for the defendant in support of his contention is *Harding v. Town of Townshend*, 43 Vt. 536; 5 Am. Rep. 304; but we regard the case as strongly against him. It was an action against a town for damages occasioned by a defective highway, and it was held that the defendant was not entitled to have deducted the amount received by the plaintiff from an insurance company on account of the injuries for which he claimed to recover against the town; which would seem to be precisely the point now under consideration. The principles upon which the decision was made to rest are equally in point. They are given in the first part of the opinion of the court delivered by Peck, J., who says: "There is no technical ground which necessarily leads to the conclusion that the money received by the plaintiff of the accident insurance company should operate as a defense or inure to the benefit of the defendant. The insurer and the defendant are not joint tort-feasors or joint debtors, so as to make a payment or satisfaction by the former operate to the benefit of the latter. Nor is there any legal privity between the defendant and the insurer, so as to give the former a right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff and at his expense, and to the procurement of which the defendant was in no way contributory. It is in the nature of a wager between the plaintiff and a third person, the insurer, to which the defendant was in no measure privy, either by relation of the parties or by contract, or otherwise. It cannot be said that the plaintiff took out the policy in the interest or behalf of the defendant, nor is there any legal principle which seems to require that it be ultimately appropriated to the defendant's use and benefit." These are the principles that controlled the case, and must equally control the one at bar. But the opinion proceeds to answer objections on the part of the defense, and in the course of the discussion it is shown that the defendant as a wrong-doer is in no position to make such objections. These expressions were seized upon as the turning-point of the case, when, in our judgment, they were not so intended at all. The opinion continues as follows: "But it is urged on the part of the defense that the

plaintiff is entitled to but one satisfaction for the injury he has sustained. If we assume this to be a correct proposition, the question arises whether the defendant stands in a condition to make this objection. This depends on the question, Who, as between the insurer and the defendant, ought to pay the damage? which of the two ought primarily to make compensation to the plaintiff, and ultimately to bear the loss?" Then, after referring to the obligation of the town to keep its highways in good repair, it is added: "The defendant is found liable in consequence of the breach of this duty. The defendant town, therefore, in respect to the injury the plaintiff has sustained, is the wrong-doer; and whether such by some positive, affirmative act, or by culpable negligence, does not vary the principle applicable to the case."

Although it was very natural, in answering the particular objection of the defendant, to call the town a wrong-doer, and to argue the matter upon that basis, yet the above extract makes it obvious that the court did not intend by "wrong-doer" one necessarily guilty of positive negligence. This view is materially strengthened by what follows, where it is said: "In principle, the question involved in this case has been settled in analogous cases"; citing *Mason v. Sainsbury*, 3 Doug. 61, and *Clark v. Inhabitants of Hundred of Blything*, 3 Dowl. & R. 489, where, as we have seen, there was no actual wrong, but only a statutory one, as in the case at bar.

In commenting on the case of *Harding v. Town of Townshend*, 43 Vt. 536, 5 Am. Rep. 304, counsel for the defendant seemed to assume that, to entitle the insurance company to be substituted in the place of the plaintiff, it must appear that the defendant was guilty of negligence or some positive wrongful act. Such, however, is not the true doctrine, but it is this: "Where one person discharges an obligation which primarily rests upon another, he shall be subrogated to the place of the injured party or the creditor, in respect to the party who is primarily liable": *Connecticut Ins. Co. v. Erie R'y Co.*, 10 Hun, 59; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 397; 30 Am. Dec. 90; Wood on Fire Insurance, 793, note 1.

One other point made on the trial has been assigned for error, although it was not noticed in the argument for the defendant. The defendant claimed that the rule of damages was the value of the goods at the time of their destruction, without interest, but the court allowed interest from the date of the injury to the date of judgment. It has been sometimes

said that interest is not to be allowed on unliquidated demands. There are actions, such, for instance, as assault and battery or slander, to which the rule is applicable. But where the demand is for property that has a market value susceptible of easy proof, there is no propriety in such a rule. A loss of property having a definite money value is practically the same as the loss of so much money; the loss of the use of the property is practically the same as the loss of the use (or interest) of so much money. We think, therefore, a just indemnity to the plaintiff required the addition to the value of the goods at the time of their destruction of the interest from that time to the date of judgment. This court has already applied such a rule to actions of trover for the conversion of goods, as in *Clark v. Whitaker*, 19 Conn. 319, 48 Am. Dec. 160, and *Cook v. Loomis*, 26 Conn. 483; and to the action of trespass for taking personal property, as in the case of *Oviatt v. Pond*, 29 Conn. 479.

There was no error in the judgment complained of.

SUBROGATION, DOCTRINE OF, WHEN APPLIED. — To justify the application of the doctrine of subrogation, a person must have paid a debt due to a third person, for the payment of which another was in equity primarily liable; and the person paying the debt must, in doing so, have acted under the compulsion of saving himself from loss, and not as a mere volunteer: *Opp v. Ward*, 125 Ind. 241; 21 Am. St. Rep. 220, and note; *Fidelity Ins. etc. Co. v. Shenandoah V. R. R. Co.*, 86 Va. 1; 19 Am. St. Rep. 858. Where property insured is destroyed by and through the negligence of a third party, the insurer paying the loss is, to the extent of the payment, subrogated to the rights and remedies of the owner against the wrong-doer: *Home Mut. Ins. Co. v. Oregon etc. Nav. Co.*, 20 Or. 569; 23 Am. St. Rep. 151, and note.

DAMAGES — INTEREST. — The owner of property destroyed by negligence of another is entitled to interest on the value of such property from the time of its destruction: *Fremont etc. R. R. Co. v. Marley*, 25 Neb. 138; 13 Am. St. Rep. 482; *Kendrick v. Towle*, 60 Mich. 363; 1 Am. St. Rep. 526.

O'BRIEN v. MILLER.

[60 CONNECTICUT, 214.]

NONSUIT SHOULD NOT BE GRANTED IF THERE IS SUBSTANTIAL EVIDENCE produced by the plaintiff in support of his case which should be weighed and considered by the jury.

NEGLIGENCE IS NOT PRESUMED AGAINST THE OWNER OR DRIVER OF A HORSE from the fact that the horse, attached to a cart, ran away while in charge of the driver, and, notwithstanding his efforts to control him, ran over and injured a person in the street.

E. F. Cole, for the appellant.

D. Davenport, for the appellees.

ANDREWS, C. J. The plaintiff brought an action in the superior court for New Haven County against the defendants, demanding damages for being run over and injured by a horse belonging to the defendants.

The complaint alleged that the defendants' servant, while engaged in their business, negligently, carelessly, and unskillfully drove a team belonging to them against and over the plaintiff, knocked him down, cut open his scalp, broke his right knee, and otherwise seriously injured him. The defendants in their answer admitted that a horse of theirs, while being driven by their servant in their business, collided with the person of the plaintiff; but they denied that such fact was caused by the fault, negligence, or misconduct of themselves or their servant. The issue was closed to the jury. At the close of the plaintiff's evidence, when he had rested, the defendants moved for a nonsuit, which the court granted. The court having refused to set aside the nonsuit on motion of the plaintiff, he brings the case here by appeal.

The evidence offered by the plaintiff tended to show that he was an employee of the Naugatuck Railroad Company, and that on the day he was injured he was engaged in cleaning the Bank Street crossing of that railroad in the city of Waterbury; that while so engaged a horse of the defendants, hitched to an empty coal-cart, dashed upon the crossing just in front of a locomotive-engine which stood there blowing off steam, ran over the plaintiff, pitched him forward several yards to the ground, turned, ran again over the plaintiff and up the track, and could not be stopped till he had reached the defendants' stables; that the horse was frequently uncontrollable and unmanageable, and afraid of a locomotive, and that the plaintiff had been obliged to keep out of his way on other occasions; that at the time the horse struck the plaintiff he was running away, and was entirely beyond the control of the driver, who was at that time exerting his utmost skill to prevent the horse doing any injury to the plaintiff; and that the plaintiff did not see the horse until the instant he was hit, just as the horse was rearing up over him. No evidence of the cause that led up to the injury was offered.

In cases tried to the jury, the rule is, that if there is substantial evidence produced by the plaintiff in support of his

cause which should be weighed and considered by the jury, a nonsuit should not be granted. The plaintiff's right to recover in this action depended upon his proving negligence on the part of the defendants, either their own or of their servant. Without some proof of this, he was properly nonsuited. The plaintiff's counsel does not deny this proposition. He argues, however, and upon this his whole claim rests, that the fact that the defendants' horse was running away was, without explanation, evidence from which the jury might find such negligence. If by this argument it is intended to claim that as a matter of law there is any evidence of negligence in the fact of a runaway horse, it is clearly wrong. *Button v. Frink*, 51 Conn. 342, 50 Am. Rep. 24, was a case where the plaintiff claimed damages for injuries done to him by the defendant's horse while running away. The court said (p. 349): "If a horse is running away with his driver, there is nothing in the fact itself which tends to show negligence in the driver, or which tends to show how the horse became unmanageable, any more than a house on fire tends to show the origin of the fire, whether accidental or otherwise; and it would seem that it could as well be inferred in such a case that the party residing in the house was guilty of negligence in causing its destruction, in the absence of explanatory evidence showing the contrary, as it can be inferred from the mere fact that a horse is running away that the driver is guilty of negligence in causing his running, in the absence of proof to the contrary. If such a doctrine should be established as the law, it is not easy to see to what extent it might not be carried."

If, however, it is claimed only that the fact of the horse running away affords a presumption of fact that there was negligence on the part of the defendants, then, of course, it must be taken in connection with the other facts. There is the fact that the horse had previously been frightened when near the cars, and had become unmanageable. This fact is not of itself evidence of negligence, although it might call for increased care on the part of the driver. And then there is the fact proved that at the time of the collision the driver was exercising the highest care to prevent injury. This, so far from showing negligence, is positive evidence the other way. No other fact is found in the evidence.

We think the nonsuit was properly granted, and that there is no error.

NEGLIGENCE — RUNAWAY TEAM. — Defendant's team, while being driven by him with due care along the highway, became frightened at a locomotive and ran upon plaintiff's land, causing injury. Defendant was not liable for the damage: *Brown v. Collins*, 53 N. H. 442; 16 Am. Rep. 372, and note; *Griggs v. Fleckenstein*, 14 Minn. 81; 100 Am. Dec. 199, and note; *Turner v. Buchanan*, 82 Ind. 147; 42 Am. Rep. 484. The driver of a team along a street is not an insurer against accidents: *Collins v. Leafey*, 124 Pa. St. 203.

TRIAL — NONSUIT. — Evidence from which, from a fair inference of the facts, a jury might be justified in finding for the plaintiff should be submitted to the jury and a motion for nonsuit refused: *Baker v. Lewis*, 33 Pa. St. 301; 75 Am. Dec. 598; *Phillips v. Brigham*, 26 Ga. 617; 71 Am. Dec. 227, and note, where previous cases are collected.

McCASKILL v. CONNECTICUT SAVINGS BANK.

[60 CONNECTICUT, 300.]

NEGOTIABLE INSTRUMENT, WHAT IS NOT. — A SAVINGS BANK PASS-BOOK is not a negotiable instrument, nor does it become such when accompanied by a written order signed by the person to whom it was issued, directing the bank to pay the amount credited to him therein to another person.

IF A SAVINGS BANK ISSUES A PASS-BOOK WITHOUT RECEIVING ANY CONSIDERATION THEREFOR, as where a forged check is deposited with it, and the amount thereof credited on such book to the depositor of the check, neither the latter nor his assignee in good faith can recover of the bank the amount of such credit.

ESTOPPEL. — REPRESENTATION PROCURED BY FRAUD does not ordinarily create any estoppel, nor prevent the person making it from proving how it came to be made, and that it is not true.

ESTOPPEL. — A SAVINGS BANK IS NOT ESTOPPED FROM PROVING THAT A PASS-BOOK ISSUED BY IT WAS PROCURED by depositing with it as genuine a forged check on another bank, and obtaining credit for the amount of such check, though the holder of the pass-book has assigned it, or given an order on the bank for the amount thereof, to an innocent person, who paid value therefor in good faith.

ACTION to recover the amount credited upon a pass-book of the defendant savings bank. In December, 1887, a person claiming to be Michael Harrison, and that he lived at 68 Walnut Street, New Haven, presented to the defendant for deposit a check for \$1,250, purporting to be signed by D. D. Stone, and drawn upon the Mercantile National Bank of the city of New York, payable to the order of said Harrison. The rules of the defendant did not permit it to receive so large a sum as \$1,250 from one person at one time. The check in question was received, and a pass-book issued for \$750 in the name of Michael Harrison, and another for \$500 in the name of Thomas Harrison, who was represented to be the brother

of Michael. The depositor was not known to the defendant, nor was any identification given or required; neither did the officers of the bank know the signature to the check. The check was in fact forged, and the man who deposited it did not live at 68 Walnut Street, as he represented. On sending the check for collection, it was returned protested, and the defendant became aware of its true character, and caused notices to be published in the newspapers in New Haven, stating that the books referred to had been obtained through fraud, and warning all persons against buying or negotiating them. In January, 1888, and for three years prior thereto, plaintiff was United States consul at Dublin, Ireland, at which place, in the month named, a person called, representing himself to be Michael Harrison, and requested a loan on money upon one of the pass-books issued by defendant, and that the book be sent to New Haven for collection. The defendant recommended the man to apply to the Ulster Bank for the loan, but that bank declined to make any loan directly to the man, but the plaintiff indorsed a draft drawn by the man, and this the bank discounted, and the plaintiff was compelled to pay it, after which he did not see or hear of Harrison. At the time of indorsing the draft the plaintiff received an order as follows:—

“DUBLIN, 27th Jan., 1888.

“TO TREASURER CONNECTICUT SAVINGS BANK.

“Pay to Messrs. J. J. Stuart & Co., or bearer, seven hundred and fifty dollars (with interest thereon), on my deposit-book, No. 29007.

MICHAEL HARRISON.”

J. J. Stuart & Co. were correspondents of the Ulster Bank at New York, to whom it immediately forwarded the book and order for collection. On presenting the book and order, the defendant declined to make any payment, and the deposit-book, being returned to the Ulster Bank, was by it handed to plaintiff. Each of the pass-books contained the following by-law of the bank: “Sec. 2. Each depositor shall be furnished with a pass-book containing the by-laws of the bank, in which shall be transcribed his account with the bank as entered upon the books of the treasurer; and every depositor receiving such a book shall be deemed and considered as assenting to and as bound by all the rules and regulations of the bank. When the deposits are withdrawn, the pass-book shall be presented; and no payment shall be made except to depositors, or upon their written order, accompanied in all

cases with the pass-book," and also a blank form of order as follows:—

*This bank-book must be presented with the order.

“(Town and date.)

“\$——.

“Treasurer of the Connecticut Savings Bank of New Haven, pay to ——, or bearer, —— dollars, on my deposit-book, No. ——.

“Witness, ——.”

Judgment for defendant; plaintiff appealed.

G. D. Watrous and E. G. Buckland, for the appellant.

C. R. Ingersoll, for the appellee.

LOOMIS, J. Upon the trial of this case, and upon the facts contained in the finding, the plaintiff's contentions relative to five questions were overruled by the court, and furnish the only foundation for this appeal. But as four of the questions embrace only two subjects, the questions for our review may well be reduced to three, as follows: 1. Is the savings bank pass-book upon which the suit is predicated a negotiable instrument? 2. Is the defendant bank estopped from showing that the \$750, which appears on that book to the credit of Michael Harrison, was in fact never deposited with the bank, nor any part of it? 3. Did the court err in holding that the plaintiff was not a *bona fide* holder of the pass-book?

1. The first question we are constrained to answer in the negative. The pass-book was not negotiable by itself, nor by virtue of the written order signed by the pretended depositor directing payment to J. J. Stuart & Co., or bearer. In *Eaves v. People's Sav. Bank*, 27 Conn. 229, 71 Am. Dec. 59, the bank undertook to defend against the suit in favor of a depositor to recover the money deposited, upon the ground that the amount had been paid in good faith to a person who brought the original pass-book to the bank, accompanied with an order good on its face, though in fact forged. This court held that the forged power of attorney was no power, and that the presentation of the book itself had no greater effect, because it was not negotiable. There was not a very full discussion of this point, but the court held that the rights of the depositors would be very insecure if the pass-book was held negotiable.

It may be suggested that if the book was accompanied with a genuine order for the payment of the money the rights of the depositor could not be affected, and that therefore the

reasoning could not apply to the case at bar; but if we concede that the rights of the particular depositor who had given a genuine order to pay the money to another would not be rendered insecure by holding the instrument negotiable, yet it would seriously affect the rights of the depositors in their relation to each other and to the assets of the bank. A reference to some decisions of this court in respect to these relations will render the point more clear. In *Coite v. Society for Savings*, 32 Conn. 173, it was held that savings banks were "incorporated agencies for receiving and loaning money on account of the owners; that they have no stock and no capital; and that they are merely places of deposit where money can be left to remain or be taken out, at the pleasure of the owner."

In *Osborn v. Byrne*, 43 Conn. 155, 21 Am. Rep. 641, it was held that "a savings bank is an agent for the depositors, receiving and loaning their money; and its losses are their losses, and are to be borne by them equally, according to their interest. The depositors in savings banks bear the same relation to each other and to the assets of the bank that stockholders in other monetary institutions do to each other and to the property of the bank." In *Bunnell v. Collinsville Sav. Soc.*, 38 Conn. 203, 9 Am. Rep. 380, the defendant bank having met with a loss equal to twenty-four per cent of the deposits, the directors reduced the amount of each depositor's credit in that proportion. In an action by a depositor to recover of the bank the amount so deducted, it was held that the defendant was merely the agent of the plaintiff to receive and hold his money, and that the loss was occasioned by his own act, through the instrumentality of his agent, and that he could not recover. Now, suppose in the the last case the plaintiff, before or after the act of the directors reducing the amount of the deposits, had sold his book, and given the proper order to some *bona fide* purchaser for full value, and the latter had brought such a suit against the bank to recover the original deposit in full. Could he recover any better than the original depositor? If he could, then the act of one depositor could injuriously affect the rights of all the others; for they would have to bear the additional reduction in consequence of paying one in full. It seems to us that no principle can be accepted which admits of such inequality and injustice, and it is contrary to the principles already adopted by this court in the decisions referred to.

In the case at bar, by reason of fraud, forgery, and falsehood, Harrison obtained two pass-books from the bank, upon which appeared credits amounting to \$1,250, when in truth nothing had been contributed to the funds of the bank. If by assigning the books he made this fraud successful, the amount, of course, is virtually to be paid by the honest depositors. It is certain that Harrison, in his own name, could recover nothing at all in a suit against the bank, for he contributed nothing to its deposits. We think he should not be allowed, by assigning his book, to convert nothing into something, but that the nature and purpose of savings banks, and the relation of depositors to each other, as well as their mutual security, all require the application of the principle that no depositor can convey to another any greater right in the funds of the bank than he has himself, and that any defense on the part of the bank which is good against the original depositor is equally good against his assignee, unless there are facts to create an estoppel.

The argument in behalf of the plaintiff, founded upon an assumed analogy between certificates of deposit issued by commercial banks and the pass-books issued by savings banks, is fallacious, for there is no such analogy. The two kinds of banks are created for widely different purposes. The former must have a capital of their own, and the purpose for which they exist is to facilitate commercial transactions over a wide territory, while the latter have no capital, and hold no relations to commerce; are neither adapted nor designed to aid commercial transactions, have a local and limited field for their operations, and hold no relation to any persons except their depositors and those to whom the depositors' money has been loaned. The purpose of the certificate issued by a commercial bank is to enable the person receiving it to obtain credit in the public markets, and to carry his funds safely to remote places. On the other hand, the savings bank pass-book is not issued with any design to induce third persons to give credit to the holder; but its sole purpose is to put in a shape convenient for the depositor and the bank a statement of the accounts between them; and the order about which so much was said in argument is, in contemplation of the law, the mere appointment of some person as agent for the depositor to receive the money. In *Eaves v. People's Sav. Bank*, 27 Conn. 229, 71 Am. Dec. 59, it is well termed "a power of attorney." By this, we do not, of course, intend to have it implied that

the depositor cannot sell his right to the money. Like any other non-negotiable chose in action, it may be sold, subject to the equities and defenses between the original parties.

But the plaintiff further contends that the book, with or without the order, was made negotiable by contract. We are not quite sure that we apprehend the force of this point as it lay in the mind of counsel. There was no transaction with any one but Harrison, and by reason of his fraud, that was no contract at all, and besides, as it is for the law to declare the negotiability of instruments, we do not see how the mere contract of the parties can be effectual to this end.

In further confirmation of the result we have reached, that the savings bank pass-book is not negotiable, we refer to the following well-considered cases: *Commonwealth v. Reading Sav. Bank*, 133 Mass. 16; 43 Am. Rep. 495; *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58; 54 Am. Rep. 653; *Witte v. Vincenot*, 43 Cal. 325.

In *Witte v. Vincenot*, 43 Cal. 325, it was held that "the pass-book of a savings bank was an account kept between the bank and the depositor, . . . showing the business transactions of the parties with each other. . . . It is not of itself a negotiable instrument, nor could any mere agreement of the parties to it have the effect to invest it with that character in a commercial sense. In this respect, the account shown in the pass-book is not to be distinguished from the account of a merchant or tradesman kept with his customer in the same way, nor would the agreement of the parties to such account, that the account itself might be transferred to order, have any more effect upon the rights and remedies of any third party in the one case than in the other. . . . That a negotiable instrument may be transferred to order is clear; but it does not follow that every instrument which may be transferred to order is thereby necessarily become a negotiable instrument. A collateral agreement between the parties that an instrument in writing, not negotiable, might be transferred by the holder to order would not alter the character of the instrument itself."

2. We come now to the question whether, upon the facts that appear in the finding, the defendant is estopped from showing that the sum appearing on the book to the credit of Harrison was in fact never deposited.

The precise claim of the plaintiff under this head is, that the defendant was estopped by its negligence, which impli-

edly concedes that this is the one controlling fact to create the estoppel. But negligence on the part of the defendant is a fact not found by the court, and without such a finding there is no foundation at all for the plaintiff's claim. There was no specific duty resting upon the bank which, being omitted, constituted negligence as matter of law. There are doubtless facts and circumstances which as evidence would tend to show negligence, but they failed to convince the trial court of the fact, and so they amount to nothing for the purposes of this review. This alone defeats the claim of estoppel; but there are other essential elements wholly wanting. The only representation on the part of the defendant was the entry contained in the pass-book, which was not made with knowledge of the material facts on the part of the defendant, nor was the party to whom it was made ignorant of the truth. The pass-book was obtained from the bank by gross fraud, and therefore it was not in law issued by the defendant bank. And where representations have been procured by fraud, except under very peculiar circumstances, — such, for instance, as representations directly affecting the currency of negotiable paper, — there will be no estoppel upon the party making them, though made with the full intention that they should be acted upon. But here there was no such intention: *Bigelow on Estoppel*, 2d ed., 450; *Wilcox v. Howell*, 44 N. Y. 398; *Holden v. Putnam Fire Ins. Co.*, 46 N. Y. 1; 7 Am. Rep. 287; *Calhoun v. Richardson*, 30 Conn. 210; *Sinnett v. Moles*, 38 Iowa, 25.

Then, in addition to all these insuperable objections to the plaintiff's claim, we have the fact that the plaintiff himself was guilty of negligence, and is not a *bona fide* holder of the pass-book.

3. But here the plaintiff claims that the court erred in finding that the plaintiff was not a *bona fide* holder of the pass-book. The fact was distinctly alleged in the complaint that he was a *bona fide* holder, and denied in the answer, — presenting a distinct issue of fact, which the court, upon all the evidence, found adversely to the plaintiff. We think the finding is conclusive on this point.

There was no error in the judgment complained of.

BANKS AND BANKING — PASS-BOOK, WHETHER A NEGOTIABLE INSTRUMENT. — The pass-book issued by a savings bank to a depositor is not a negotiable instrument; *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58; 54 Am. Rep. 653. Compare *Iron City Nat. Bank v. McCord*, 139 Pa. St. 52; 23 Am. St. Rep. 166. Money deposited in a savings bank can be legally de-

manded and received therefrom only by the depositor or his attorney: *Eaves v. People's Sav. Bank*, 27 Conn. 229; 71 Am. Dec. 59.

BANKS AND BANKING. — MONEY PAID ON FORGED CHECKS, drafts, and such like instruments may be recovered back by the bank that pays them, when the forged signatures were not such as the bank was bound to know: Note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 898, 899.

BANKS AND BANKING. — ENTRY OF AMOUNT AND DATE OF DEPOSIT in the pass-book of a depositor, made by the proper officer, binds the bank, and is generally conclusive as an account stated, when the pass-book is balanced: *Wasson v. Lamb*, 120 Ind. 514, 16 Am. St. Rep. 342, and note 347, upon the conclusiveness of entries in bank-books, generally.

ESTOPPEL, WHEN DOES NOT ARISE. — An estoppel in pais cannot arise against one, except when justice to other persons demands it: *State v. Churchill*, 48 Ark. 426; *Madden v. Louisville etc. R'y Co.*, 66 Miss. 258. As to what are the essential elements of estoppel in pais, see *Bynum v. Preston*, 69 Tex. 287; 5 Am. St. Rep. 49.

VAIL v. HAMMOND.

[60 CONNECTICUT, 374.]

CO-OWNERS, POWER OF COURT TO ORDER SALE OF PROPERTY OF. — Under the statutes of Connecticut, courts of equitable jurisdiction have the power to order a sale of property owned by two or more persons jointly or in common when, in the opinion of the court, the sale will better promote the interests of the owners; but no person is entitled to the benefit of this statute who is not interested in the property as an owner. Hence the court is not, by this statute, authorized to direct its sale to pay debts.

CREDITOR'S BILL. — WHERE THE SAME COURT ADMINISTERS BOTH LAW AND EQUITY, and may grant both legal and equitable remedies in the same action, a creditor may, upon the same complaint, recover judgment for his debt, and also the necessary equitable aid to obtain payment out of any property of the debtor which a law court could not reach.

PATENTS — CREDITOR'S BILL TO REACH. — The right acquired by a patentee upon the issuing of a patent is property subject to the claims of creditors, and may be reached by proper proceedings in equity and applied to the payment of his debts.

CREDITOR'S BILL COMPELLING TRANSFER OF PATENT. — A court of equity may, at the instance of a creditor of a patentee, require him to transfer his patent to a receiver to be by the latter applied to the payment of debts.

CREDITOR'S BILL — PATENT, DISCRETION OF COURT TO ORDER SALE OF. — Where a court of equity, upon a creditor's bill, finds that certain patents and other property were, by agreement of the parties, to be sold and after paying plaintiff his advances, that the net proceeds were to be divided between plaintiff and defendant, it may require the defendant to transfer the patents to a receiver and direct the latter to sell them, and may, without committing reversible error, refuse the request of the defendant, that in case he should, within a reasonable time, pay all sums found due plaintiff, and all costs and expenses, then that the receiver should not sell the patents and should convey one half thereof to defendant and the other to the plaintiff.

A. P. Hyde and H. Cornwall, for the appellant.

C. E. Perkins and A. Perkins, for the appellee.

ANDREWS, C. J. The cause of action set forth in this complaint is based upon the breach of an alleged contract between the parties, both of whom resided in this state, to sell certain patents owned by the defendant, for the purpose of paying the plaintiff the advancements which he claims to have made to the defendant in respect to the patents.

The defendant demurred to the complaint and assigned various reasons of demurrer. Most of these point out grounds on which it was claimed that the complaint was multifarious.

The demurrer was overruled. Before the hearing, the plaintiff, by amendments to the complaint, and by changing the prayers for relief, removed the causes for which these reasons of demurrer were assigned. If it be true that the complaint was multifarious at first, and there was error in overruling the demurrer, still, we think, by reason of the amendments, such error did not injuriously affect the defendant, and that under section 1135 of the General Statutes it cannot be considered on appeal.

Another reason of demurrer was, that the superior court, as a state court, had no power to order the sale of the defendant's interest in the patents on the ground that a sale would better promote the interests of the plaintiff and the defendant. Section 1307 of the General Statutes is, that "courts of equitable jurisdiction may, upon the complaint of any person interested, order the sale of any estate, real or personal, owned by two or more persons, when, in the opinion of the court, a sale will better promote the interests of the owners; and of any real estate in which, or any portion of which, two or more persons may have different and distinct interests, when, in the opinion of the court, such real estate cannot be conveniently used and occupied by the parties in interest together, and a sale will better promote the interests of the owners." The argument of the defendant is, that this statute applies only to tangible property which is within the jurisdiction of the courts of this state; and that a patent is not property within the jurisdiction of any state court.

The jurisdiction of a court of equity is ordinarily *in personam*, and not *in rem*. A state court having jurisdiction of all the persons interested in a patent might, perhaps, compel the sale of the patent, in a proper case, for the purpose of con-

verting a joint ownership into several ownerships, as well as to compel the sale for any other purpose. The language of the statute is broad enough to confer such power. But we do not decide this. We purposely leave it undecided.

The real ground on which the demurrer should have been placed was, that the case made in the complaint was not one which authorized the court to order a sale under that statute. The object of the statute is to enable any joint owner, or owner in common with another, of real or personal property, to put an end to such joint ownership. "No person can be compelled to remain the owner with another of any real estate, not even if it became such by his own acts. Every owner is entitled to the fullest enjoyment of his property, and that can come only through an ownership free from dictation by others as to the manner in which it shall be exercised. Therefore the law affords to every owner with another relief by way of partition, and this regardless alike of the difficulties attending separation and the consequences to his associate. Rights to the use of running water and rights to dig ores have been declared to be subject to this law. But inasmuch as it might sometimes happen that by a partition the property would be practically sacrificed, the statute has opened the way of escape from such a result. It permits a court of equity to order the sale when, in its opinion, a sale will better promote the interests of the owners": *Johnson v. Olmsted*, 49 Conn. 517. This decision had reference to real estate, but the statute confers equal power on the court to order a sale in cases of the joint ownership of personal property. A series of decisions has shown that this statute applies only in cases of ownership. It does not mean that any person interested in any way in real or personal estate may bring a complaint and that the court must order a sale. But only those interested therein as owners are so entitled: *Spencer v. Waterman*, 36 Conn. 342; *Wilson v. Peck*, 39 Conn. 54; *Potter v. Munson*, 40 Conn. 473; *Ford v. Kirk*, 41 Conn. 9; *Johnson v. Olmsted*, 49 Conn. 509.

This statute does not confer any power on the court to order a sale of property for the purpose of paying debts. The plaintiff was not the owner of the patents in this case. He did not claim to be the owner; on the contrary, he asserted that the defendant was the sole owner. He did not seek to be made the owner of them, but only asked that they be sold, in order to pay him a debt. We think, therefore, this averment of the complaint should have been stricken out, either upon the de-

murrer or upon a motion to expunge. If, however, the other averments in the complaint require, or fully support, the judgment that was in fact made, then this averment may be treated as surplusage, and has done the defendant no harm: *Sanford v. Thorp*, 45 Conn. 241.

Later in the progress of the case, the defendant filed an answer, and there was a hearing. The court found the issues for the plaintiff, and that there was an agreement between the parties that all the patents should be sold, and from the avails of such sales the advances made by the plaintiff, with interest thereon, should be first paid, and the remainder of such avails after such payments should be equally divided between them. The court also found the amount of the advancements made by the plaintiff, that the defendant refused to proceed further under the agreement, or in selling or attempting to sell the patents, and that the plaintiff and defendant were unable to come to any agreement respecting their interest in the property, and thereupon appointed a receiver, ordered the defendant to convey the several patents to the receiver, and directed the receiver to sell the same, and to apply the avails as set forth in the judgment.

The defendant insists that the judgment goes beyond the allegations of the complaint. He does not deny that the judgment, so far as it directs a sale of the patents for the purpose of repaying to the plaintiff the advancements he has made, is warranted by the averments of the complaint. But, he says, the court has gone further, and has found that the whole of the patents were to be sold, — not merely enough to repay the plaintiff, but the whole of the patents, — and the proceeds divided; and in this respect, he says, the finding is not authorized by the allegations of the complaint, and is a finding of matter not in issue.

This objection must be answered by a reference to the complaint. The first and the third paragraphs contain the averments necessary to be considered. The first is important in this respect only because it is by reference made a part of the third. The first paragraph alleges that the plaintiff was the owner of certain pistols and parts of pistols; that the defendant was a mechanic and inventor of skill and experience, and that they agreed that the defendant should devise some plan to convert such pistols and parts of pistols into sporting-rifles, and that the plaintiff should advance all sums of money necessary for expenses and materials and for the hiring of

other workmen. "And it was further agreed that all such sums so advanced by said Vail, with interest thereon, should be first repaid to him from the sales of such rifles and pistols, and that the remainder of such rifles and pistols, after such reimbursement, should belong equally to said Hammond and said Vail, and the net returns arising from the sales thereof should be divided equally between them." This was an agreement concerning property which was valuable, not to hold, but only to sell, and the agreement was made for the purpose of putting the property into a condition more convenient for sale, and so it became plain that the agreement alleged is one for the sale of the property, and not for a holding of it in joint ownership.

The third paragraph alleges that "it was agreed by and between said Vail and said Hammond that said Vail should engage in obtaining the pending and other patents for such improvements then made or to be made relating to said system, on the same terms as said agreement (the one mentioned in the first paragraph) had been entered into; that is to say, that said Vail should advance all needed moneys for perfecting said improved system and method of making axes, and procuring letters patent therefor, and making the same available for use or sale, and that all such advancements should be first repaid to said Vail from the use or sale of said patented inventions or improvements and letters patent, and thereafter all such inventions or improvements so made by said Hammand, and the letters patent obtained therefor, and the tools, machinery, and other property proper for the carrying out of said agreement, should be and become the joint property of said Vail and said Hammond equally, and all moneys and property arising from the sale or use of the same should be equally divided between them." It is impossible to read this paragraph without perceiving that the pleader had in mind, and intended to state, a contract between the parties that included as one of its terms the sale of the entire patents, and the division of so much of the avails as exceeded the amount of the advancements that had been made by the plaintiff. The answer denied any agreement whatever to sell the patents, either in part or in whole. It averred that the defendant was to convey a one-half interest in the patents to Vail in payment for the advancements he had made, and that they were to own and hold them together. If the defendant had then had any doubts as to the claim the plaintiff intended to make in re-

gard to a sale of the patents, he might have asked and obtained an order for a more specific statement. He did not do so. He makes no claim that the finding of the court was not based upon sufficient and competent evidence. According to his claim now, this evidence would not have been admissible. But he did not object to it. It seems to us that the finding and the judgment of the court in respect to the sale of the patents was fairly within the issue, and we are unable to see that the defendant was in any wise misled.

In this view of the complaint (and laying out of it, as already indicated, the averment that a sale would better promote the interests of the parties), it is a creditor's bill seeking to apply these patents in payment of the defendant's debt to the plaintiff. It alleges the agreement between the parties pursuant to which the indebtedness arose, states the debt, and the fact that these patents were agreed to be sold for its payment, the refusal of the defendant so to do, and that the defendant is without other property or estate from which the debt can be secured, and prays for a sale of the patents, through an officer of the court, to the end that the indebtedness may be paid.

A creditor's bill strictly exists only in those jurisdictions where law and equity are administered by separate tribunals. A creditor first obtains a judgment in a court of law, and then seeks the aid of a court of equity to apply in payment of the judgment some property which could not be attached or taken on execution in the action at law. But in this state, where the same court administers both law and equity, and where legal and equitable remedies can be granted in the same action, a creditor can in the same complaint have judgment for his debt, and also the necessary equitable aid to obtain payment out of any property of the debtor which the law court could not reach. The allegations of the complaint as summarized above are sufficient, in substance and in form, to sustain such a decree. No want of power in the court is suggested, and there was full jurisdiction over the parties.

It is settled by abundant authority that the right acquired by the patentee by the issue of a valid patent is property which is subject to the claims of a creditor, and may be reached by a proper proceeding in equity and applied to the payment of his debts: *Gillett v. Bate*, 86 N. Y. 87; *Wilson v. Martin-Wilson etc. Fire Alarm Co.*, 149 Mass. 24; 151 Mass. 515; *Barnes v. Morgan*, 3 Hun, 703; *Pacific Bank v. Robinson*,

57 Cal. 520; 40 Am. Rep. 120; *Fuller and Johnson Mfg. Co. v. Bartlett*, 68 Wis. 73; 60 Am. Rep. 838; *Stephens v. Cady*, 14 How. 531; *Ager v. Murray*, 105 U. S. 126. And to accomplish this object, the court may require the debtor to execute a conveyance of the patent to a receiver: *Pacific Bank v. Robinson*, 57 Cal. 520; 40 Am. Rep. 120; *Barton v. White*, 144 Mass. 281; 59 Am. Rep. 84; *Keach's Petition*, 14 R. I. 571; *Ager v. Murray*, 105 U. S. 126; *Satterthwait v. Marshall*, 4 Del. Ch. 337; *Searle v. Hill*, 73 Iowa, 367; 5 Am. St. Rep. 688; 3 Robinson on Patents, 660; and may also require the conveyance of a patent issued by another government: *Adams v. Messinger*, 147 Mass. 185; 9 Am. St. Rep. 679. It is conceded by the defendant that the court might compel such a conveyance in a case of insolvency. But the power of the court is no greater to compel the conveyance of a patent for the benefit of creditors generally, than it is to compel one for the benefit of a single creditor. Besides, if by possibility there was any defect or want of power in the court to make such an order, it would in this case be more than supplied by the agreement of the defendant to do this very thing. The order of the court in this respect would be in the nature of a specific performance of that agreement: *Binney v. Annan*, 107 Mass. 94; 9 Am. Rep. 10; *Somerby v. Buntin*, 118 Mass. 279; 19 Am. Rep. 459; *Nesmith v. Calvert*, 1 Wood. & M. 34; *Hartell v. Tilghman*, 99 U. S. 547.

It is stated in the finding that after the decision of the issues in the case in favor of the plaintiff, but before the judgment file had been signed or filed, the defendant requested the court to decree, and provide in the judgment file, that in case Hammond should, within a reasonable time after such conveyance to the receiver as might be ordered by the court, pay or cause to be paid to the receiver the sums found to be due to the plaintiff, and all outstanding bills, costs, and expenses of the receivership, then the receiver should not sell the patents and property, but should convey one half thereof to the plaintiff and the other half to the defendant. The court declined so to do. The defendant assigned this as one ground of error. We cannot regard the refusal as an error in law. Having found the facts set out in the complaint to be proved and true, it was the duty of the court to so frame its decree as to secure to the plaintiff the relief to which those facts entitled him. And while this ought to be done in a way to be the least burdensome to the defendant, he cannot re-

quire that the rights of the plaintiff be sacrificed to his convenience. If there is more than one method that may be adopted, it is for the court, in the exercise of its discretion, to select that one which on the whole is the best. And such exercise of discretion is not ground for error.

As to the nipper patent, the objection seems to have been obviated by the form of the decree.

There is no error in the judgment appealed from.

CREDITOR'S BILL—EQUITY ANCILLARY TO LAW.—Equity is ancillary to the law in aiding creditors by judgment and execution, where it is necessary for their satisfaction: *McLure v. Benceni*, 2 Ired. Eq. 513; 40 Am. Dec. 437; but a creditor is not entitled to aid in law and equity at the same time: *McGough v. Ins. Bank*, 2 Ga. 151; 46 Am. Dec. 382, and note; see extended note to *Massey v. Gorton*, 90 Am. Dec. 288, where the creditors' bills and proceedings in equity in aid of execution are discussed.

CHANCERY COURTS—POWER TO CHARGE INTEREST OF ONE OF SEVERAL CO-DISTRIBUTEES.—The interest of one of several co-distributees may be charged by chancery with the payment of a judgment, but it should first be set apart by the court: *Lang v. Brown*, 21 Ala. 179; 56 Am. Dec. 244; and note.

CREDITOR'S BILL—WHAT PROPERTY SUBJECT TO.—Every species of property of a debtor, including debts, choses in action, and equitable rights, may be reached by creditor's suit: *Edmeston v. Lyde*, 1 Paige, 637; 19 Am. Dec. 454.

AMERICAN CASUALTY INSURANCE AND SECURITY COMPANY v. FYLER.

[60 CONNECTICUT, 418.]

PRACTICE—MANDAMUS.—AN ALTERNATIVE WRIT OF MANDAMUS MUST SHOW UPON ITS FACE a clear right to the relief demanded, and the material facts upon which the applicant relies must be distinctly set forth, so that they can be admitted or denied; otherwise the writ may be quashed.

PRACTICE—MANDAMUS.—OBJECTIONS TO A WRIT OF MANDAMUS, whether of form or of substance, may be taken by motion to quash.

MANDAMUS WILL NOT ISSUE TO A PUBLIC OFFICER, UNLESS the duty to be enforced by it is the performance of some precise, definite act, or is one of a class of acts purely ministerial and in respect to which the officer has no discretion whatever, and the right of the party applying for it is clear, and he is without other adequate remedy.

MANDAMUS WILL NOT ISSUE TO CONTROL AN EXECUTIVE OFFICER in discharging an executive duty involving the exercise of discretion or judgment.

DEFINITION.—A MINISTERIAL ACT is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done.

MANDAMUS WILL NOT ISSUE TO COMPEL AN EXECUTIVE OFFICER to perform an act, when the duty of performing it depends on the construction of a statute, and the officer has construed it as not requiring him to perform the act, though the court may be of the opinion that his construction of the statute is incorrect.

MANDAMUS WILL NOT ISSUE TO AN INSURANCE COMMISSIONER to compel him to admit a foreign insurance company to do business in the state, if he is vested by the statute with a discretion respecting the admission, and has construed the statute as not requiring him to admit such company, though the court may not agree with him in his construction of the statute.

W. F. Henney and A. L. Shipman, for the appellants.

E. D. Robbins, for the appellee.

ANDREWS, C. J. The plaintiff, a corporation organized under the laws of the state of Maryland, applied to the defendant, who is the insurance commissioner of this state, for permission to transact in this state insurance business "against loss and damage caused by accident to any person or property arising from explosions of steam-boilers or other causes, employers' liability insurance, and the insurance of the fidelity of persons employed in positions of trust." The defendant heard the application, and at the request of the plaintiff gave a second hearing. Then, after consideration, he declined to grant to the plaintiff the permission it had asked for. The plaintiff thereupon made application to the superior court for a writ of peremptory *mandamus*, commanding the defendant to admit the plaintiff to do in this state the kinds of business above mentioned. The defendant accepted service of the application so made to the superior court, and that application, by consent of all the parties, has been treated as the alternative writ.

On the return day, the defendant came into court and moved that the alternative writ be quashed. The court heard argument, and indicated that the motion ought to be granted, unless the writ should be amended, and gave the plaintiff time in which to amend. The plaintiff neglected to make any amendment, and the motion was granted. The plaintiff now appeals to this court.

In any case of *mandamus*, as the alternative writ is the foundation of all the subsequent proceedings, it must show upon its face a clear right to the extraordinary relief demanded, and the material facts on which the plaintiff relies must be distinctly set forth, so that they can be admitted or denied. If it does not do this, it will be abated or held in-

sufficient on a motion to quash. All formal objection to the writ must be taken by a motion to quash: *Fuller v. Plainfield Academic School*, 6 Conn. 532. And objections to the substance may be so taken: *Moses on Mandamus*, 202-206; *Shortt on Mandamus*, 397; *High on Extraordinary Legal Remedies*, sec. 522; *Commercial Bank of Albany v. Canal Comm'rs*, 10 Wend. 26; *State v. Lean*, 9 Wis. 279.

The principle upon which persons holding public office may be compelled by a writ of *mandamus* to perform duties imposed upon them by law has been pretty clearly defined and strictly adhered to in numerous cases in this court and in courts of other states: *Freeman v. Selectmen of New Haven*, 34 Conn. 406; *Seymour v. Ely*, 37 Conn. 103; *Batters v. Dunning*, 49 Conn. 479; *Atwood v. Partree*, 56 Conn. 80; *United States v. Black*, 128 U. S. 40; *United States v. Windom*, 137 U. S. 636; *Kendall v. United States*, 12 Pet. 524; *Decatur v. Paulding*, 14 Pet. 497; *United States v. Guthrie*, 17 How. 304; *Howland v. Eldredge*, 43 N. Y. 457; *People v. Brennan*, 39 Barb. 651; *Smith v. Mayor etc. of Boston*, 1 Gray, 72.

The principle set forth in these authorities is, that a writ of *mandamus* may issue where the duty which the court is asked to enforce is the performance of some precise, definite act, or is one of a class of acts purely ministerial and in respect to which the officer has no discretion whatever, and the right of the party applying for it is clear and he is without other adequate remedy; and that the writ will not issue in a case where the effect of it is to direct or control an executive officer in the discharge of an executive duty involving the exercise of discretion or judgment. The rule is stated very clearly by Mr. Justice Bradley in *United States v. Black*, 128 U. S. 40. He says: "The court will not interfere by *mandamus* with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require the interpretation of the law, the court having no appellate power for that purpose; but where they refuse to act in a case at all, or where, by a special statute or otherwise, a mere ministerial duty is imposed upon them,—that is, a service which they are bound to perform without further question,—then, if they refuse, a *mandamus* may be issued to compel them." The same rule is given in *High on Extraordinary Legal Remedies*, sec. 42, where that author adds: "Indeed, so jealous are the courts of encroaching in any manner upon the discretionary powers of public officers, that, if any reasonable

doubts exist as to the question of discretion or want of discretion, they will hesitate to interfere, preferring rather to extend the benefit of the doubt in favor of the officer." "A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done": *Flournoy v. City of Jeffersonville*, 17 Ind. 169; 79 Am. Dec. 468.

The subject of insurance engages nearly one hundred and forty sections of the General Statutes, and covers more than thirty pages of the statute-book. All these sections, taken together, form a complete and symmetrical branch of the executive government of the state, which in common speech is called the insurance department. The defendant is at the head of that department. His duties are, generally, that he 'shall see that all the laws relating to insurance companies are faithfully executed.' This alone vests him with a wide range of discretion and judgment.

But, in addition to this general description of his duties, there are repeated sections which impose upon him in terms the exercise of discretion. Section 2822 vests him with authority at any time to "examine into the methods of business of any company, corporation, association, partnership, or combination of persons doing any kind or form of insurance business in this state." He may make orders binding upon such companies, and may apply for an injunction to control their business, or for the appointment of a receiver to wind it up. Sections 2829 to 2836 vest him with discretionary powers concerning fire and marine insurance companies. Sections 2857 and 2858 give him like powers concerning life insurance companies. By section 2869 he may apply for a receiver for any life insurance company and for the annulment of its charter. By section 2906 he may revoke the certificate he has issued to any insurance company incorporated by any other state, upon proof of its unsoundness. Section 2834 gives him discretion respecting the admission of fire and marine insurance companies into this state to do business. Section 2846 relates to foreign fire insurance companies, section 2867 to life insurance companies, and section 2893 to assessment insurance companies. Throughout all these sections the authority given to the defendant is administrative, or quasi judicial, rather than ministerial: *Perry v. Reynolds*, 53 Conn. 527.

It is admitted that there is no statute or rule of law that in terms makes it the duty of the defendant to admit the plaintiff to do in this state the kinds of business specified in its application. If it is his duty so to admit the plaintiff, it is because such duty falls within the ordinary duties of his office; and this must be gathered from the construction of the insurance statutes. The defendant has construed these statutes as requiring, or at least as authorizing, him to refuse the plaintiff's application. The plaintiff insists that such construction is wrong. The whole contention of the plaintiff's counsel is, that the statutes of this state respecting insurance, if construed in the light of the policy of this state towards the insurance companies of other states, and in the light of state comity, would make it the duty of the defendant to grant the plaintiff's request; and they say that their interpretation of these statutes is too obviously correct to admit of dispute, and that therefore the duty which they ask that the defendant should perform is purely a ministerial one. This contention, however, involves a contradiction. The construction of a statute is not a ministerial act; it is the exercise of judgment. If it is the duty of the defendant to admit or not to admit the plaintiff to do business in this state according to the interpretation to be put on the insurance statutes, then the admitting or refusing to admit involves the exercise of discretion and judgment. It is precisely the same kind of a duty which selectmen perform in respect to the admission of electors: *Perry v. Reynolds*, 53 Conn. 527; or assessors in respect to the liability of property to taxation: *Goddard v. Town of Seymour*, 30 Conn. 394. It is not a purely ministerial act, and a *mandamus* ought not to issue.

If the court was of the opinion that the defendant's construction of the insurance statutes was an incorrect one, it could not interfere by way of *mandamus*. That would be to substitute the judgment of the court for the judgment of the officer appointed by law, and would, in effect, make the court the insurance commissioner instead of the defendant.

"If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department. And if they suppose his decisions to be wrong, they would, of course, so pronounce in their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and

in which it is their duty to interpret the act of Congress, in order to ascertain the right of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it, by *mandamus*, act directly upon the officer, and guide and control his judgment or discretion in the matter committed to his care, in the ordinary discharge of his official duties": *Decatur v. Paulding*, 14 Pet. 497. See also *United States v. Guthrie*, 17 How. 284; *Commissioner of Patents v. Whiteley*, 4 Wall. 522; *Gaines v. Thompson*, 7 Wall. 347; *Freeman v. Selectmen of New Haven*, 34 Conn. 406.

Tested by the authorities herein brought together, it is plain that the alternative writ in this case does not state facts which entitle the plaintiff to a peremptory *mandamus*, and that the motion to quash was properly granted.

There is no error in the judgment appealed from.

MANDAMUS — DISCRETIONARY ACTS — SUPERINTENDENT OF INSURANCE. — The discretion of the superintendent of insurance in granting and refusing, or in revoking, licenses to insurance companies cannot be controlled by *mandamus*: *Dwelling-house etc. Ins. Co. v. Wilder*, 40 Kan. 561; compare *State v. Barnes*, 25 Fla. 298; 23 Am. St. Rep. 516, and note.

MANDAMUS WILL NOT LIE TO CONTROL AN EXECUTIVE OFFICER in the discharge of executive duties involving the exercise of discretion: *Hovey v. State*, 127 Ind. 588; 22 Am. St. Rep. 663, and note.

MANDAMUS. — For a thorough discussion of the law of *mandamus*, see extended note to *Dane v. Derby*, 89 Am. Dec. 728-742.

MANDAMUS — PLEADINGS. — As to the form, sufficiency, and effect of the pleadings in *mandamus*, see note to *Dane v. Derby*, 89 Am. Dec. 741, 742. An alternative writ of *mandamus* must state a cause of action; and its legal sufficiency may be tested by demurrer: *Wheeler v. Northern Colorado Irr. Co.*, 10 Col. 582; 3 Am. St. Rep. 603. A petition for *mandamus* cannot be demurred to, but must be assailed by a motion to quash it, or the defects may be reached by return: *Dane v. Derby*, 54 Me. 95; 89 Am. Dec. 722; *State v. Board of Equalization*, 10 Iowa, 157; 74 Am. Dec. 381.

DEFINITION — MINISTERIAL ACT. — A ministerial act is one which a person performs under a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to or exercise of his own judgment upon the propriety of the act being done: *Flournoy v. Jeffersonville*, 17 Ind. 169; 79 Am. Dec. 468, and note 472, 473; note to *Hawkins v. Governor*, 33 Am. Dec. 361, 362; note to *Mayor v. Morgan*, 18 Am. Dec. 236.

WARNER v. WILLOUGHBY.

[60 CONNECTICUT, 468.]

STATUTE OF FRAUDS — PROMISE TO PAY THE DEBT OF ANOTHER.—A promise by the owner of a building in process of construction, that he will see a subcontractor paid for his work if the original contractor does not pay him, is a promise to pay the debt of another, and within the statute of frauds, though the subcontractor is entitled to file a lien against the building, and the consideration of the promise is forbearance to file such lien.

C. H. Fowler, for the appellant.

E. P. Arvine, for the appellee.

SEYMOUR, J. The complaint in this case alleges, in substance, that one Humphrey contracted to erect a dwelling-house for the defendant on the defendant's land. On the same day Humphrey made a contract with the plaintiff, as a subcontractor, to do the mason-work upon the house for seven hundred dollars. Before the plaintiff began to work under his contract he informed the defendant that he had made it, and of the terms thereof, and stated that he should at once give written notice to him, the defendant, that he intended to claim a lien for the services he should render and the materials that he should furnish in performing the contract, and should file a mechanic's lien therefor in due time in the town clerk's office. And the defendant thereupon agreed that if the plaintiff would not give such notice, nor claim nor file any lien upon said dwelling-house and the premises on which the same stood, for services rendered and materials furnished by him in the construction thereof, he, the defendant, would pay him the contract price on his performance of the contract, and for such work as he should do on the house, provided the same was not paid by Humphrey, or so much thereof as Humphrey did not pay. And in consideration thereof, the plaintiff promised the defendant that he would not give any notice of such lien, or claim or file any lien upon the premises. The plaintiff did not give any notice of such lien, nor claim nor file any lien upon the premises, and fully performed his contract with Humphrey. Humphrey paid the plaintiff a part of the contract price, but has never paid him in full, and the defendant refuses to pay the balance due upon the same.

The finding of facts gives the testimony of the plaintiff and his son respecting the agreement between the plaintiff

and defendant. The plaintiff testified as follows: "I said to Mr. Willoughby that I had just been burned by Mr. Humphrey's brother, and if I did the mason-work to that house I wanted to secure myself, and be sure I got my money when I got the work completed, and that the law provided for a subcontractor that I should file a notice of lien. I asked him, I says: 'You don't want a lien put on your house, do you?' He says: 'No; if you will keep off your lien I will see that you have your pay. The money all comes through my hands.' 'Well,' I says, 'then, Mr. Willoughby, I won't put on the lien.'" The plaintiff's son testified to the same effect, and also that during the progress of the work he heard the defendant say he was perfectly satisfied with the way the plaintiff was doing his work, and he should see that he had his pay; and that when the work was nearly completed, the defendant said: "He has done me a good job and I am satisfied, and I will see he has his money, and when it comes to Humphrey, he will have to come pretty near to living up to the contract."

The defendant objected to the testimony of the plaintiff and his son, which was all that the plaintiff offered to prove the contract and the terms thereof, on the ground that the promise as alleged was not in writing, and was therefore within the statute of frauds. The court overruled the objection and admitted the testimony, and the defendant excepted.

The defendant denied that he made the promise alleged in the complaint or testified to as aforesaid.

Several requests to charge were filed by the defendant, which were not complied with. The court, among other things, charged the jury as follows: "If you find that it was agreed between the plaintiff and defendant that the plaintiff should not file a lien on the defendant's house, and that the defendant, in consideration of his not filing a lien, should see that he was paid for his work upon the house,—that is, should pay him if Mr. Humphrey did not; and if you further find that the plaintiff did not file the lien and has not been paid,—your verdict should be for the plaintiff to recover the balance remaining due him. If you find this contract to have been made,—that is, the contract which the plaintiff has testified to,—it is not necessary that it should be in writing. If in consideration that the plaintiff would not file a lien the defendant promised to see the plaintiff paid, that contract is a good and valid one. If this contract was made, and the plaintiff did

not file a lien, and was not paid in full by Humphrey, the defendant is liable for the balance."

The jury returned a verdict in favor of the plaintiff to recover one hundred dollars damages, and the defendant appealed.

A number of reasons for appeal are assigned. It will be sufficient if we notice those which present the question whether the promise sued upon, testified to, and presented to the jury by the court as a valid promise was within the statute of frauds.

It seems to have been understood by the parties and the court alike that the defendant did not agree that if the plaintiff would forbear proceedings to place a lien upon the premises described, the defendant would pay him the seven hundred dollars, or any part thereof, for which he had contracted to do the work. No such promise is alleged or testified to. On the contrary, the promise alleged and testified to is substantially the promise of which the court treated in its charge and instructed the jury to be a valid and binding one, though not in writing, namely, a promise to see the plaintiff paid for his work,—to pay if Mr. Humphrey did not. This is clearly not a direct undertaking to answer in the first instance. It was not understood by the parties that Humphrey was not liable to pay the plaintiff under the contract, or that his liability was affected by the undertaking of the defendant. Humphrey continued liable, and in fact paid a large part of the contract price. The undertaking upon which the plaintiff relied was that of a person, not before liable, for the debt or duty of another who continued liable to pay for the work performed under the contract. It was a collateral undertaking, and within the statute of frauds.

The construction of the statute, and especially of the second clause thereof, has been so recently considered in *Dillaby v. Wilcox*, 60 Conn. 71, *ante*, p. 299, that it would be superfluous to consider it at any length here. The principles there laid down are decisive of this case. The court below was wrong in holding, upon the question of the admissibility of evidence and in its charge to the jury, that it was not necessary to the validity of the contract relied upon by the plaintiff that it should have been in writing.

There is error in the judgment appealed from, and a new trial is ordered.

STATUTE OF FRAUDS—PROMISE TO PAY THE DEBT OF ANOTHER.—A promise to answer for the debt of another means an undertaking by a person, not before liable, for the purpose of securing the same duty for which the party for whom the undertaking is made continues liable: *Packer v. Benton*, 25 Conn. 343; 95 Am. Dec. 246, and extended note; *Barker v. Bucklin*, 2 Denio, 45; 43 Am. Dec. 726, and note; *Anderson v. Davis*, 9 Vt. 136; 31 Am. Dec. 612, and note; *Farley v. Cleveland*, 4 Cow. 387; 15 Am. Dec. 387, and note; *Sedgwick v. Bliss*, 23 Neb. 617. A case very similar to the principal case is *Clark v. Jones*, 85 Ala. 127.

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CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

MCGINNIS *v.* FERNANDES.

[135 ILLINOIS, 69.]

EJECTMENT — OWNERSHIP OF GROWING CROPS. — As between the successful plaintiff in ejectment and the defendant or his tenant, the growing crop is a part of the realty, and belongs to the plaintiff; nor will the wrongful act of defendant or his tenant in severing the crop from the soil destroy such ownership.

EJECTMENT — OWNERSHIP OF GROWING CROPS. — The fact that the successful plaintiff in ejectment may have his action for mesne profits does not affect his right to crops grown on the land wrongfully withheld from him.

Gross and Broadwell, and J. F. Barrows, for the appellants.

Greene and Humphrey, for the appellee.

WILKIN, J. On April 21, 1886, appellee brought an action of ejectment against D. E. McGinnis and others, in the circuit court of Sangamon County, claiming the lands described in his declaration. Three trials were had, each resulting in favor of appellee, and on the last (November 10, 1887), judgment was rendered in his favor, finding that he owned the premises in fee, and was entitled to the possession thereof. From this judgment said McGinnis appealed to this court, which appeal remained undetermined until November 14, 1888, when the judgment of the circuit court was affirmed. On the same day a certified copy of the order of affirmance was filed in the clerk's office of the circuit court, and a writ of possession issued. On the next day the writ was executed, by placing appellee in possession of the premises. In March,

1888, after the rendition of said judgment in the circuit court, and while the appeal was pending here, said D. E. McGinnis leased the land to appellants, his sons, who took possession and raised a crop of corn thereon. This corn, at the time of the execution of the writ of possession, was cut up, and placed in shocks on the ground. Appellee refused to deliver it to appellants on demand, and they thereupon brought this suit in replevin. The judgment in the circuit court was for appellee. Appellants appealed to the appellate court for the third district, where the judgment of the circuit court was affirmed.

The only question involved in the case is, To whom did the property belong at the time this suit was brought? It was expressly decided in *Altes v. Hinckler*, 36 Ill. 275, 85 Am. Dec. 407, that as between the successful plaintiff in an action of ejectment and the evicted defendant, growing crops are a part of the realty, and belong to the plaintiff. This ruling rests upon the fact that in law the defendant is treated as a trespasser. See also *McLean v. Bovee*, 24 Wis. 295; 1 Am. Rep. 185; *Rowell v. Klein*, 44 Ind. 290; 15 Am. Rep. 235, and cases cited.

Appellants cannot claim to be in any better position as to the corn in question than would have been their father had he raised it. They were wrong-doers in holding possession of the land and cultivating it. They, in law, have no better standing than had Collins in *Crotty v. Collins*, 13 Ill. 567, or than did Rogers in *Simpkins v. Rogers*, 15 Ill. 397. Being trespassers, appellants had no right to plant or cultivate the crop. Therefore, while growing or standing on the ground, it belonged to the owner of the soil. The act of cutting and shocking it was also the act of trespassers. The growing corn was the property of appellee. The wrongful act of severing it from the soil could not destroy that ownership. The fact that the successful plaintiff in ejectment may have his action for mesne profits cannot affect his right of ownership to crops grown on the land wrongfully withheld from him. That remedy may be wholly unavailing, by reason of the insolvency of the defendant.

We are satisfied with the conclusion reached by the appellate court, and the reasoning by which it is sustained in the opinion of Justice Wall.

Judgment affirmed.

EJECTMENT. — **GROWING CROPS** are a part of the realty, and as between the successful plaintiff and the evicted defendant, the former is entitled to them or their value: *Altes v. Hinckler*, 36 Ill. 275; 85 Am. Dec. 407; *Gardner v. Kersey*, 39 Ga. 664; 99 Am. Dec. 484; *McLean v. Bovee*, 24 Wia. 295; 1 Am. Rep. 185; *Carlisle v. Killebrew*, 89 Ala. 329.

BEIDLER v. CRANE.

[135 ILLINOIS, 92.]

FRAUDULENT CONVEYANCES — ASSIGNMENT ABSOLUTE IN FORM INTENDED AS SECURITY. — Under an assignment of a patent right absolute in form, but intended only as security for present indebtedness to and future advances to be made by the assignee, he will take as a mere mortgagee, and not as an absolute owner of the patent, as against the creditors of the insolvent assignor.

FRAUDULENT CONVEYANCES — ASSIGNMENT CONTAINING SECRET TRUST. — The effect of a recorded assignment of a patent right absolute in form, and based upon ample consideration, but intended merely as security for money advanced, is necessarily to mislead, deceive, and defraud creditors of the insolvent assignor; and as it contains a secret trust in his favor, it is fraudulent and void as against them.

FRAUDULENT CONVEYANCES, WHEN UPHELD AS TO CONSIDERATION ADVANCED. — Where an assignment of property is set aside solely on the ground that it is constructively fraudulent as to creditors, it will be upheld to the extent of the actual consideration, and be vacated only as to the excess; but when it is fraudulent in fact, it is absolutely void as to creditors of the assignor, and is not permitted to stand for any purpose of reimbursement to the assignee.

FRAUDULENT CONVEYANCES — GUILTY KNOWLEDGE OF ASSIGNEE. — Even though an assignee of property pays a valuable and full consideration, yet if the assignor assigns for the purpose of defeating the claims of his creditors, and the assignee knowingly assists in effectuating such fraudulent intent, or even has notice thereof, he will be regarded as a participant in the fraud.

FRAUDULENT CONVEYANCES — PROOF OF FRAUD. — Though the fact that an assignment absolute in form is intended merely as security will only justify the deduction that it is constructively fraudulent, yet when the fraudulent assignee claims that his ownership of the property is absolute, and that the assignor has no interest therein, it affords strong proof of actual fraud.

FRAUDULENT CONVEYANCES — RIGHTS OF CREDITORS UNDER ASSIGNMENT OF PATENT RIGHT. — The right acquired by a patentee on the issue of a valid patent right is properly subject to the claims of creditors, and may be reached by creditor's bill; and when the patentee assigns the patent to a fraudulent assignee with intent to defraud his creditors, and a corporation is organized on the basis of the patent, and shares of stock are issued to the assignee thereof, such shares are subject to the claims of the creditors of the insolvent assignor.

PRACTICE — ERROR WITHOUT INJURY. — An irregularity consisting in entering one decree as applying to several creditors' bills, when a separate

decree should have been entered on each bill, is error without injury, when such bills were against the same parties, involved the same issues, and were by consent heard together upon the same evidence without consolidation, and affords no ground for reversal.

G. W. Stanford, for the appellant.

H. T. Helm, Lynn Helm, and John Lyle King, for the appellees.

BAKER, J. The appellees, Charles S. Crane, John Lyle King, Henry E. Seelye, and Joseph Pfirshing, severally recovered judgments against Albert C. Ellithorpe for the respective sums of \$7,932.30, \$2,033.67, \$824.62, and \$200, besides costs, and the executions issued upon such judgments were returned "no property found." They thereupon prosecuted in the circuit court of Cook County their several creditors' bills against said Ellithorpe, the appellant, Henry Beidler, the Ellithorpe Safety Air Cushion Company, and the Ellithorpe Air Brake Company, for the purpose of subjecting to the payment of their respective judgments certain shares of stock in the two corporations mentioned that stood in the name of the appellant, Beidler. The causes were heard together, and a single decree was entered. The decree found that the assignments made by Ellithorpe to Beidler of various letters patent which had been issued to him, said Ellithorpe, by the United States patent-office, for air-cushions and for air-brakes to be used in the construction and operation of elevators in buildings, and the assignments made by Beidler of certain of said patents to the Ellithorpe Safety Air Cushion Company, and of certain other of said patents to the Ellithorpe Air Brake Company, and each of which said patents was estimated as capital in the particular company to which it was so assigned, and shares of capital stock in said respective corporations issued therefor to said Beidler, as against appellees, who were creditors of said Albert C. Ellithorpe, were fraudulent and void, and subjected the shares of stock into which the patents had been converted, and which were held by Beidler, to the payment of the judgments above mentioned. From the decree thus rendered Beidler appealed to the appellate court for the first district, and there was there a judgment of affirmance, and from that judgment he took this second appeal.

The contentions of appellees, as made by their bills of complaint, were, that the various assignments of the letters patent were made by and through the procurement of Ellithorpe,

with the intent to hinder, delay, and defraud them, and prevent them from enforcing the payment of their debts, and with the intent and for the purpose of a secret trust for the benefit of said Ellithorpe, of all of which intents Beidler had knowledge, and that he, Beidler, intentionally participated and aided in the effectuation of such designs.

The contention of the appellant, Beidler, as shown by his answers and in his own testimony, was, that the sales and assignments made by Ellithorpe to him of the patents were absolute, and for a valuable and sufficient consideration, and that he, in turn, sold and assigned them to the corporations named, and that neither he nor the corporations, nor either of them, held either the patents or the stock for the use or benefit of Ellithorpe, and that the latter had no interest whatever in the stock of either corporation.

Appellant and Ellithorpe were old and intimate friends, and their wives were cousins. The former was a man of large pecuniary means, while the latter was and for many years had been hopelessly and notoriously insolvent, and numerous executions against him had been returned *nulla bona*. Ellithorpe was a man of considerable inventive genius, and had conceived the idea of constructing at the bottom of the elevator-shaft an air-tight receptacle, into which the elevator-cab would fit, so that, as it entered, a cushion of air should be formed and gradually arrest the fall of the cab; and subsequently conceived the further idea of an air-brake, by means of which, in case of an accident, the rapid fall of an elevator-cab could be arrested prior to the time it should reach the air-cushion at the bottom. It appears from the evidence, that, commencing in 1877 and continuing for a number of years thereafter, appellant furnished to Ellithorpe numerous and considerable sums of money, which were used by the latter in providing the means of subsistence for himself and family while he was engaged in developing his inventions, and in the payment of the expenses incurred in his experiments, and in procuring his patents, and in creating a public demand for his devices. No entries were made of these advances in any books of account, but the evidence shows that on each occasion of a borrowing, or shortly thereafter, a promissory note due one day after date was given for the sum furnished. In August, 1879, the air-cushion patent was obtained, and in February, 1880, it was assigned to appellant; and the air-brake patent was issued October 11, 1881, and assigned to him October 13,

1881. Both of these assignments were for the whole interest in the respective patents, and they were duly recorded in the patent-office at Washington.

It is manifest from the proofs that at the times when the patents were assigned they were not sold to appellant, but were, at most, merely pledged to him as security for the moneys which he had advanced. The fact that the assignments, though absolute in form, were only by way of security for then existing indebtedness and for future advances is virtually conceded by both Beidler and Ellithorpe in their testimony, and by counsel in their briefs and arguments. It is suggested, however, that by a subsequent arrangement the transfer of the patents became absolute, by the surrender to Ellithorpe, on the part of appellant, of forty-five thousand dollars or more, in notes of the former. There is no satisfactory evidence of such an agreement. There was no purchase price agreed upon for the patents, or either of them, and there was no valuation placed upon them, or either of them, by both or either of the parties. As we have already stated, Ellithorpe was insolvent, and there were numerous judgments against him, and for large amounts, and there is no testimony proving, or even tending to show, that forty-five thousand dollars was a fair and reasonable valuation to place upon the patents. Besides this, there are serious conflicts between the testimony of the two parties in regard to the supposed arrangement, not the least of which are, that while one of them states that it was in settlement of all advances to the date it was made, the other testifies that it did not extinguish all of the indebtedness existing at such date; and that while Ellithorpe testifies that the settlement and surrender of the vouchers was in January, 1882, appellant places such surrender in the spring of 1885, and after the filing of the creditors' bills now under consideration. We cannot, under the evidence, hold otherwise than that appellant not only was, at the times of the assignments of the patents, but still continues to be, the mere mortgagee or pledgee of such patents, and never was, and is not now, the absolute owner thereof.

A conveyance of property which is absolute upon its face, but which is really intended as a mortgage or security, is well enough as between the parties, but the settled doctrine is, that such a transfer of property is fraudulent and void as to creditors. Here, the assignments of the patents were absolute in form, and were duly recorded in the patent-office, and they

imported unconditional sales. Hence their natural and necessary effect was to mislead, deceive, and defraud creditors. They were, in substance and in fact, the creation of secret trusts for the benefit of the assignor, and, as such, frauds upon the rights of those to whom he was justly indebted. Even if we should assume that the transfers were for valuable and ample considerations, and were not as matter of fact intended to accomplish covinous and dishonest purposes, yet, as there were trusts which were not disclosed by the writings, and were therefore secret trusts, it follows that the law itself regards the transactions as lacking the element of good faith, and conclusively infers fraud, and that the courts are bound so to pronounce: *Lukins v. Aird*, 6 Wall. 78; *Metropolitan Bank v. Godfrey*, 23 Ill. 579; *Moore v. Wood*, 100 Ill. 451; *Hurd v. Ascherman*, 117 Ill. 501; *Blennerhassett v. Sherman*, 105 U. S. 117. There is no question, then, but that the assignments were constructively fraudulent.

It is urged that there was error in the decree of the circuit court, in that it did not prefer the claim of appellant to the amount of the moneys by him actually advanced and paid for, and on account of the several patents in the record named, over and as against the claims and demands of the several appellees. It is without doubt the rule in equity, that where a conveyance or transfer of property is set aside solely upon the ground that it is constructively fraudulent as to creditors, it will yet be upheld to the extent of the actual consideration, and be vacated only as to the excess: *Phelps v. Curts*, 80 Ill. 109; *Lobstein v. Lehn*, 120 Ill. 549. The difficulty, however, with this claim of appellant is, that both the circuit and the appellate courts have found that the deeds of assignment by which the letters patent were transferred were fraudulent in fact, as well as from mere implication of law, and that we, after a very careful examination of all the evidence found in the record, concur in that view. A transfer of property must not only be upon a good consideration, but it must also be *bona fide*. Even though the grantee or assignee pays a valuable, adequate, and full consideration, yet if the grantor or assignor sells for the purpose of defeating the claims of his creditors, and such grantee or assignee knowingly assists in effectuating such fraudulent intent, or even has notice thereof, he will be regarded as a participator in the fraud, for the law never allows one man to assist in cheating another: *Bump on Fraudulent Conveyances*, 2d ed., 197 et seq. A deed fraudu-

lent in fact is absolutely void as against creditors, and is not permitted to stand for any purpose of reimbursement or indemnity: *Lobstein v. Lehn*, 120 Ill. 549; *Phelps v. Curts*, 80 Ill. 109.

In the case of *Sands v. Codwise*, 4 Johns. 536, 598, 599, 4 Am. Dec. 305, it was said by Chancellor Kent: "A fraudulent conveyance is no conveyance as against the interest intended to be defrauded. . . . It is impossible that those deeds can be permitted to stand as a security, if they are to be adjudged void *ab initio*. . . . I presume there is no instance to be met with of any reimbursement or indemnity afforded by a court of chancery to a *particeps criminis*, in a case of positive fraud. . . . It is fit and proper that this result should take place, as a contrary course might afford countenance to fraud by giving it a partial effect. It would not become a court of equity to take a single step to save harmless a party detected in a fraudulent combination to cheat. No right can be deduced from an act founded in actual fraud." See also *Wait on Fraudulent Conveyances*, sec. 162.

The statute makes void all conveyances and assignments made with the intent to delay, hinder, or defraud creditors of their just and lawful claims, and the instruments of assignment are not purged of the fraud because there was a real and *bona fide* indebtedness, to some amount, due from Ellithorpe to appellant: *Merry v. Bostwick*, 13 Ill. 398; 54 Am. Dec. 434; *Reed v. Noxon*, 48 Ill. 323.

We have already announced our conclusion that the assignments of the letters patent were fraudulent in fact. There are several matters disclosed by the record which impel us to the inference of fraud, and that appellant was a participator in the fraud of his assignor. While the circumstances that the assignments were in form absolute, and in reality only securities, would not justify a deduction more prejudicial to appellant than that they were constructively fraudulent, yet when, as in this case, the fraudulent assignee, as against the creditors of the assignor who are seeking to ascertain and enforce their equitable rights, claims, both in his answer and in his testimony, that his ownership of the assigned property is absolute, and that the assignor has no interest whatever therein, it affords strong proof of actual fraud. The evidence satisfactorily shows the fraudulent fabrication of notes for large sums of money, and the manifest purpose of such fabrication was to create a fictitious indebtedness that would defeat the collection

of their demands by the creditors of the insolvent debtor. These counterfeit instruments were not only traced to the possession of appellant, but were claimed by him at the hearing as evidences of real indebtedness. In consideration of the subsequent assignment by appellant of one of the patents to the Ellithorpe Air Cushion Company, he received 1,267 out of the 2,000 shares into which the capital stock of that company was divided; and in consideration of the assignment by him of the other of said patents to the Ellithorpe Air Brake Company, there were issued to him certificates of paid-up stock for 975 of the 1,000 shares into which the capital stock of this last-named corporation was divided. Ellithorpe is the superintendent of one company and the manager of the other, and he and his sons and his son-in-law form a majority of the directory of each.

Without going further into details in respect to these corporations, we may say that we fully concur in that which was said by the appellate court in their opinion, that the evidence shows that Ellithorpe controlled the disposition of the patents after they were assigned to appellant, organized the corporations, and had Beidler assign the patents to such corporations; and although the shares of stock stood in Beidler's name, yet Ellithorpe not only controlled their affairs, but enjoyed, substantially, all the benefits of their operations. Appellant testifies that during the time of the transactions here involved he had no information in respect to Ellithorpe being in debt, or in regard to his solvency or insolvency. In view of the notorious and long-continued insolvency of Ellithorpe, and of the relations which existed between the parties, and of the other evidence found in this record, we think that these statements are entitled to no weight whatever. We find many other circumstances corroborative of the view which we have taken of the facts of the case, such as the destruction by appellant of his paid and returned checks on the bank, and of the stubs of his check-books, the unreasonableness and inconsistencies of the account which he gives of his transactions with Ellithorpe, and the contradictions between his testimony and that of Ellithorpe, etc.; but it is useless to multiply words in regard to the matter.

The right acquired by a patentee on the issue of a valid patent is properly subject to the claims of creditors, and may be reached by creditor's bill; and when the patentee transfers the patent with intent to defraud his creditors, and a corpo-

ration is organized on the basis of the patent, and shares of stock are issued to the assignee of the patent, such shares of stock are subject to the claims of the creditors, as they represent the thing fraudulently transferred: *Gillett v. Bate*, 86 N. Y. 87.

It is urged that the circuit court erred in rendering a single decree, and in not entering separate and distinct decrees in the several causes named in the record. The several creditors' bills presented substantially the same issues, and by consent and agreement of parties they were heard together, and upon the same evidence, and without objection, a single decree was entered. The orders made setting the several causes for hearing together were not, strictly speaking, orders of consolidation. Correct practice would have required the rendition of separate decrees. But it is not perceived that appellant was damnified by the entry of a single decree, and the objection goes to mere matter of form, and not of substance, and affords no sufficient ground for reversal.

Some other objections are urged to the decree, but, in our opinion, they are without merit, and do not require special notice.

The judgment of the appellate court is affirmed.

CONVEYANCE ABSOLUTE IN FORM INTENDED AS SECURITY. — A conveyance fraudulent as to creditors may be allowed to stand, when it is intended simply as security for money advanced: *Philbrick v. O'Connor*, 15 Or. 15; 3 Am. St. Rep. 139, and note; *Evans v. Laughton*, 69 Wis. 138; *Sawyer v. Bradshaw*, 125 Ill. 440.

FRAUDULENT CONVEYANCE — WHO MAY AVOID. — A conveyance which is fraudulent and void as to creditors may be good as between the parties: *Bell v. Wilson*, 52 Ark. 171; *McElroy v. Hiner*, 133 Ill. 156. See note to *McCulloch v. Hutchinson*, 32 Am. Dec. 776.

FRAUDULENT CONVEYANCE CONTAINING SECRET TRUST — EFFECT OF. — When a conveyance is made upon a secret trust, or upon some reservation in favor of the grantor, the knowledge and intent of the grantee is immaterial, and the conveyance will be set aside: *Lyons v. Leahy*, 15 Or. 8; 3 Am. St. Rep. 133, and note; *McCulloch v. Hutchinson*, 7 Watts, 334; 32 Am. Dec. 776, and note.

HUGGINS v. PEOPLE.

[135 ILLINOIS, 243.]

CONVICTION OF THIEF NOT NECESSARY TO SUSTAIN PROSECUTION FOR BUYING STOLEN PROPERTY FOR GAIN. — Under the Illinois statute, the offense of receiving, or buying, or aiding in concealing stolen property for gain, or to prevent the owner from repossessing himself thereof, with knowledge that it has been stolen, is made a substantive crime, subject to punishment, without reference to the trial or conviction of the person committing the larceny.

BUYING STOLEN PROPERTY FOR GAIN. — To secure conviction for buying stolen property for gain, the name of the thief, or of the person from whom the defendant received or bought the stolen property, not being matter necessary to the identification of the offense, need not be alleged or proved; but where the pleader unnecessarily alleges the commission of the larceny by a particular person, or that the property was bought or received of a particular person, the allegation becomes matter of description, and must be proved as laid.

LARCENY. — **THE POSSESSION OF STOLEN PROPERTY** almost immediately after the larceny raises a presumption of guilt, which, if not rebutted, will warrant a conviction of the larceny.

BUYING STOLEN PROPERTY FOR GAIN — EVIDENCE OF. — To convict of buying stolen property for gain when the buying is admitted, the state must prove the guilty knowledge of the accused that the property was stolen at the time of the purchase. This may be shown by proof of attending facts and circumstances, from which, by the common understanding and experience of men, the inference of the fact arises; as, that the purchase was for much less than the real value; that the accused denied that the property was in his possession, or concealed it; his failure to make reasonable explanation; the evil reputation of the person from whom purchased or received, or the like.

BUYING STOLEN PROPERTY FOR GAIN — GUILTY KNOWLEDGE. — To convict of buying stolen property for gain, the guilty knowledge of the theft possessed by the accused at the time of the purchase need not be that actual or positive knowledge which one acquires by personal observation of the fact. It is sufficient if the circumstances were such, accompanying the transaction, as to make the accused believe that the goods had been stolen.

BUYING STOLEN PROPERTY FOR GAIN. — To **CONVICT** of buying stolen property for gain, the guilty knowledge of the accused of the theft at the time of purchase is the gist of the offense, and must be alleged, proved, and found by the jury as a fact; but in finding such fact the jury will be justified in presuming that the accused acted rationally, and that whatever would convey knowledge or induce belief in the mind of a reasonable person would, in the absence of countervailing evidence, be sufficient to apprise the accused of the like fact, or induce in his mind the like impression and belief.

Thomas F. Tipton and Charles M. Pierce, for the plaintiff in error.

George Hunt, attorney-general, *E. H. Miner*, state's attorney, and *E. McConnell*, assistant state's attorney, for the people.

SHOPE, J. Plaintiff in error was indicted, in the McLean circuit court, for feloniously buying, for his own gain, of one William Watson, a diamond ring of the value of sixty dollars, the goods and chattels of Josephine John, knowing that the same had been feloniously and burglariously stolen by the said William Watson. Upon the trial, the jury rendered a verdict of guilty, finding the value of the property to be thirty-five dollars, and fixing his punishment at confinement for one year in the penitentiary. Motion for new trial was overruled, and the defendant sentenced on the verdict.

The evidence shows that on Sunday night, "just before Thanksgiving" Day, A. D. 1888, while the family were at church, the house of Thomas John, in said county, was burglariously entered, and a solitaire diamond ring, the property of Josephine John, was stolen. The value of the ring is shown to be between thirty-five and sixty dollars. The *corpus delicti*, the larceny, is clearly established, and also that the larceny was committed at the time of the burglary.

By the statute (Crim. Code, secs. 239, 241), the offense of receiving or buying stolen property, or aiding in concealing the same for gain, or to prevent the owner from repossessing himself thereof, with knowledge that it has been stolen, is made a substantive crime, subject to punishment, without reference to the trial or conviction of the person committing the larceny; and the name of the thief, or of the person from whom the defendant received or bought the stolen property, not being matter necessary to the identification of the offense, need not be alleged or proved. But where the pleader, although unnecessarily, alleges the commission of the larceny, or burglary, or robbery, by a particular person, or that the property was bought or received of a particular person, the allegation becomes matter of description, and must be proved as laid: Bishop's Crim. Proc., 982; 3 Chitty's Crim. Law, 991, and authorities cited.

The date of the larceny is fixed as on Sunday night, "just before Thanksgiving Day," in November, 1888, no witness seeming able to give the precise day. It is shown by the testimony of two witnesses, that in November, 1888, William Watson, the person charged with the larceny, had the stolen ring, which the witnesses identify, in his possession, and sold it to plaintiff in error. The defendant below, Huggins, testified that he bought the ring of said Watson for ten dollars "about a week before Thanksgiving" in 1888; that Watson was then

wearing the ring and claiming it as his own. It is clear, therefore, that Watson, almost immediately after the larceny, was in the possession of the stolen property, and the presumption of fact arising from such possession, unexplained, would have warranted his conviction of the burglary and larceny. No explanatory proof occurs in this record, and we think the jury were justified in finding the allegations of the indictment, in this respect, sustained by the evidence.

The buying of the stolen property is admitted, but it was necessary in this case, there being no count for concealing or aiding in the concealment of the property, for the people to prove the guilty knowledge of the defendant at the time of the purchase, — that is, that he then had knowledge that the property was stolen property. It rarely happens that direct and positive proof of the guilty knowledge is attainable, unless the thief be produced for that purpose. It is therefore, ordinarily, to be shown by proof of attending facts and circumstances, from which, by the common understanding and experience of men, the inference of the fact arises. Thus numerous circumstances may be shown; as, that the purchase was for much less than the real value; that the defendant denied that the property was in his possession, or concealed it; his failure to make reasonable explanation; the evil reputation of the person from whom purchased or received, and the like: Bishop's *Crim. Proc.*, 991; Wharton's *Crim. Law*, 983, and cases cited. The knowledge of the theft need not be that actual or positive knowledge which one acquires by personal observation of the fact. "It is sufficient if the circumstances were such, accompanying the transaction, as to make the prisoner believe the goods had been stolen": Bishop's *Crim. Law*, 1138; Wharton's *Crim. Law*, 984. If he purchase or receive the goods with a belief that they are stolen, he will be held to have had that knowledge required by the statute.

The knowledge of the prisoner, in this sense, is the gist of the offense, and must be found by the jury as a fact. In determining whether the fact existed, the jury will be justified in presuming that the prisoner acted rationally, and that whatever would convey knowledge or induce belief in the mind of a reasonable person would, in the absence of countervailing evidence, be sufficient to apprise the prisoner of the like fact, or induce in his mind the like impression and belief.

An examination of the evidence in this record will carry

conviction, it seems to us, to any unbiased mind, of the guilt of this defendant. He knew the negro man Watson had been in the penitentiary. He was himself without means or business, and, meeting Watson, saw the ring in his possession, and upon Watson's offer to sell, bought it at one fourth or one fifth of its value. No questions were asked or inquiries made as to where or how Watson procured it, or as to its value. Nor does it appear that any price other than that paid was asked, or that its value was talked of between the purchaser and seller. The ring was purchased for ten dollars by defendant, seven dollars of which was paid on the night of the purchase, by Mary Stoner, and the rest was to be paid when the defendant got it. A few days afterward, the three dollars was paid by the defendant, and the witness Stevens testifies it was for the balance on a diamond ring sold by Watson to the defendant. The defendant then, as he says, gave the ring to Mary Stoner, and that subsequently he took it and pawned it to Em Smith for \$1.75, and testifies that he never saw it afterwards. However, about the first day of January, 1890, a warrant was issued for the arrest of the defendant and his mother, and to prevent the mother's arrest, who, the defendant said, knew nothing about the ring, he produced the ring and surrendered it to the officers. It is true, he testifies that he got it of Mary Stoner; but if that was so, the fact remains that he knew where it was, and produced it. Mary Stoner was upon the witness-stand, but was not asked to corroborate his statement.

About the 1st of December, 1889, suspicion having attached to the defendant, Joseph W. Franks went to him, and told the defendant he understood he had some rings. The defendant thereupon showed some rings, but not the one in question. This witness testifies: "Then I explained to him what kind of a ring I wanted. It was a diamond ring with one set, — solid gold ring, and run down square on the bottom. I explained to him what kind of a ring it was," and that it was stolen from Mr. John. The witness then testifies: "We talked, and he said he did n't know anything about such a ring." The officer then asked him to see if he could find out about it, and he promised to do so. On the next evening he met Franks, and told him he had not had time to see any one he wanted to see. Franks told him to see his parties, and they met again on the following evening. He then said he had tried, but could n't hear anything about such a ring. A few days

afterwards, Franks told the defendant that he (Franks) knew he had the ring, — he had so understood, and was sure of it. Defendant then again asked for a description of the ring, and upon its being again given, he said he did have it, — that he bought it of Watson. Upon being asked where the ring was, he said he had sold or pawned it to a girl by the name of Smith, for \$1.75, who, he said, was in Springfield. Upon being asked if he thought she had it yet, he said she promised to keep it for him until he redeemed it. He promised to go to Springfield about Christmas, but reported afterwards to the officer that Smith had gone from Springfield, and he could not get it. Later on, the officer, becoming satisfied, as he says, that the Smith girl did not have the ring, told the defendant so, and charged him with having it, or at least that he knew where it was, and could get it. The defendant then told the officer he could get the ring if he would pay twenty dollars. The officer declined to give him that sum, but offered to give him all that was offered by the owner; but after several interviews he said he would not get it unless promised that much money. As already seen, upon the arrest of his mother he produced the ring. In these statements Franks is corroborated in many particulars by James Stone, who was then chief of police of the city of Bloomington.

In addition to the foregoing, it should be said that about the time and just before the arrest on the warrant before mentioned, the defendant was asked if his mother did not buy the ring back of Em Smith, and he replied that "she furnished the money to buy it back." When, is not shown; but it must be apparent that while he was misleading the officers in the attempt to find the girl Smith in Springfield, Decatur, and elsewhere, the ring had been purchased back, and was at least in defendant's control. It is proper to say that the defendant, in many particulars, makes statements contradictory of Franks and Stone; but his testimony is conflicting with itself in some important respects, which might very properly have reduced its weight and credibility. We cannot, without extending this opinion unduly, go over, in detail, this voluminous evidence. When the purchase was made, it was under circumstances where no prudent man would purchase without inquiry. The defendant made none. If he was a judge of the value of the ring, he knew he was purchasing for one fourth of its value; if he was not, common prudence would dictate that, before making an honest pur-

chase, he would ascertain the value of the article bought, the means for which were readily at hand. The character of the person from whom he purchased would ordinarily put any one upon inquiry as to how he came into possession of such property. Moreover, when asked about the ring, and had it particularly described, and was informed of the larceny, he denied knowing anything about such a ring. Upon being requested to look it up, he pretended to do so, and when pressed upon the subject, pretended that the absent Smith, whose whereabouts the subsequent search failed to disclose, had it; that he had pawned it to her for a trifling sum, and she had agreed to keep it for him until he redeemed it, and subsequently admitted that his mother had furnished the money to redeem it from Smith. When no longer able to baffle the officers, he boldly admits he can produce the ring, but refuses to do so unless paid twenty dollars, and when finally arrested at the house of Watson, he produces and surrenders the ring.

We are of opinion that the evidence fully warranted the jury in believing, beyond any reasonable doubt, that the ring was stolen, as alleged, and that the defendant did buy it for his own gain, knowing it had been so obtained.

The judgment of the circuit court will be affirmed.

RECEIVING STOLEN GOODS. — If a person receives stolen goods, knowing them to be such, for the purpose of aiding the thief in making away with them, he is guilty of the crime of knowingly receiving stolen goods: *State v. Rushing*, 69 N. C. 29; 12 Am. Rep. 641; 5 Yerg. 154; 26 Am. Dec. 258, and note; *People v. Weldon*, 111 N. Y. 569. An innocent purchaser of stolen goods is liable to the owner therefor: *McDaniel v. Adams*, 87 Tenn. 756. The crime of larceny may be committed by the finder of lost goods who fraudulently appropriates them to his use: *Kennedy v. Woodrow*, 6 Houst. 46. The sale of property alleged to have been stolen may authorize a conviction for larceny: *Graff v. People*, 134 Ill. 380. Receivers of stolen goods, knowing them to be such, are punishable as principals: *State v. Weston*, 9 Conn. 527; 26 Am. Dec. 46, and note. An indictment for fraudulently receiving stolen goods need not allege the name of the person from whom the goods were received: *State v. Hazard*, 2 R. I. 474; 60 Am. Dec. 96, and note.

POSSESSION OF RECENTLY STOLEN GOODS is *prima facie* evidence of theft, authorizing a presumption of guilt: *Stockman v. State*, 24 Tex. App. 387; 5 Am. St. Rep. 894, and note; *Boyd v. State*, 24 Tex. App. 570; 5 Am. St. Rep. 908, and note; *Garcia v. State*, 26 Tex. 209; 82 Am. Dec. 605, and note; *State v. Weston*, 9 Conn. 527; 25 Am. Dec. 46; *State v. Moore*, 101 Mo. 316. Possession of stolen goods, even though considerable time has elapsed, is a circumstance tending to criminate the accused: *State v. Miller*, 45 Minn. 521.

ELMORE v. DRAINAGE COMMISSIONERS.

[135 ILLINOIS, 269.]

CORPORATIONS — NEGLIGENCE AND TORT, LIABILITY FOR. — A private corporation is bound to respond in damages for its negligence or tort.

MUNICIPAL CORPORATIONS — LIABILITY OF, FOR NEGLIGENCE OR TORT. —

Municipal corporations proper, such as villages, towns, and cities, incorporated by special charters or voluntarily organized under general laws, are liable to individuals injured by their negligent or tortious conduct, or that of their agents, in respect to corporate duties; but in regard to public involuntary *quasi* corporations, such as counties, townships, school or road districts, or the like, the rule is otherwise, and they are not so liable, unless made so by statute.

CORPORATIONS — LIABILITY. — A DRAINAGE DISTRICT, organized under a general statute providing that such districts when organized may levy special assessments upon the property benefited, is a public involuntary *quasi* corporation, without corporate liability to respond in damages to an individual member thereof injured by the tortious, negligent, or wrongful act of its officers in inundating his land. The only remedy of such member of the district is against its officers personally.

CORPORATIONS — DRAINAGE DISTRICT — PURPOSES OF ASSESSMENTS. —

Where a statute authorizes the organization of drainage districts and the levy of special assessments upon the land benefited, the power to make such assessments is referable to and included in the taxing power, and the purpose of such taxation must be public. Even the owner of the land benefited cannot be taxed to improve it, unless public considerations are involved.

CORPORATIONS — DRAINAGE DISTRICT — LIABILITY FOR INCREASING DAM-

AGES TO LAND TAKEN. — Where a statute providing for the organization of a drainage district also makes provision for just compensation for all private property taken or damaged for public use prior to such taking, it will be presumed, after such district is organized, and in the absence of proof to the contrary, that each member of the district was fully compensated for lands taken for a ditch, and paid all damages consequent upon its construction for the purposes originally contemplated. If, however, by the enlargement of the district, an additional burden of water is thrown upon the land of a member, to his detriment, the damages consequent upon such enlargement should be assessed and paid by the district prior to the discharge of such additional water upon his land.

Beach and Hodnett, for the appellant.

T. N. Mehan, for the appellees.

BAKER, J. The defendant corporation was organized in the town of Mason City, Mason County, Illinois, under the statute, in force July 1, 1879, providing for the organization of drainage districts, and for the construction, maintenance, and repair of drains and ditches by special assessments on the property benefited thereby, the commissioners of highways being the drainage commissioners of said district. Appellant,

who was plaintiff in the circuit court, is the owner of lands included in said district, and was assessed eight hundred dollars for draining said lands, and after the payment by him of such assessment, the defendant, without his knowledge or consent, enlarged the boundaries of said district, by taking in a large area of territory, including the greater part of the city of Mason City, which territory had a natural drainage for the water falling thereon, in a direction opposite to the lands of appellant, and defendant, by a system of drainage, collected the water falling on said area, and discharged all said water into the ditches on the lands of appellant, which were too small to carry off the additional water without enlarging the same, and also performed the work so carelessly and negligently as to overflow and submerge appellant's lands with the water from the territory so added to the district and precipitated upon his lands. He thereby lost the crops planted thereon, and the use of the lands; and having called the attention of the commissioners to the condition of his lands, without avail, he brought this action in case against the corporation.

The declaration contained three counts, charging substantially the above facts, and negligence on the part of the defendant in the construction of the drains, and in connecting the drains and ditches of the added territory with the drains running through appellant's lands, and negligence in failing to enlarge and give sufficient fall to the drains on appellant's lands, so as to carry off, without damage, the increased volume of water so discharged thereon. A general demurrer was interposed to the declaration and sustained, and appellant abiding by his declaration, a final judgment was rendered against him for costs. The judgment was affirmed in the appellate court, on the ground that the corporation is not liable in an action for the damages claimed in the declaration. The record has been brought here by appeal, and the assignments of error question the propriety of the judgment of affirmance entered in the appellate court.

That a private corporation formed by voluntary agreement, for private purposes, is held to respond in a civil action for its negligence or tort, goes without saying; and yet, in deciding the mooted question at issue in this case, it seems convenient to restate that proposition. So, also, it is admitted law that municipal corporations proper, such as villages, towns, and cities, which are incorporated by special charters or volun-

tarily organized under general laws, are liable to individuals injured by their negligent or tortious conduct, or that of their agents and servants, in respect to corporate duties. In regard to public involuntary *quasi* corporations, the rule is otherwise, and there is no such implied liability imposed upon them. These latter—such as counties, townships, school districts, road districts, and other similar *quasi* corporations—exist under general laws of the state, which apportion its territory into local subdivisions for the purposes of civil and governmental administration, and impose upon the people residing in said several subdivisions precise and limited public duties, and clothe them with restricted corporate functions, co-extensive with the duties devolved upon them. In such organizations the duties, and their correlative powers, are assumed *in invitum*, and there is no responsibility to respond in damages, in a civil action, for neglect in the performance of duties, unless such action is given by statute: 2 Dillon on Municipal Corporations, secs. 761, 762; Cooley's Constitutional Limitations, *240, *247; *Hedges v. County of Madison*, 1 Gilm. 567; *Town of Waltham v. Kemper*, 55 Ill. 346; 8 Am. Rep. 652.

The grounds upon which the liability of the municipal corporation proper is usually placed are, that the duty is voluntarily assumed, and is clear, specific, and complete, and that the powers and means furnished for its proper performance are ample and adequate: *Browning v. City of Springfield*, 17 Ill. 143; 63 Am. Dec. 345. In such case there is a perfect obligation, and a consequent civil liability for neglect in all cases of special private damage. The non-liability of the public *quasi* corporation, unless liability is expressly declared, is usually placed upon these grounds: that the corporators are made such *nolens volens*, that their powers are limited and specific, and that no corporate funds are provided which can, without express provision of law, be appropriated to private indemnification. Consequently, in such case, the liability is one of imperfect obligation, and no civil action lies at the suit of an individual for non-performance of the duty imposed.

Does the declaration in this cause show a cause of action against the appellee corporation? The solution of this question depends upon the answer to be given to the inquiry, In what class of corporations does appellee fall?

The reclamation of large bodies of swamp and overflowed lands, and their consequent improvement, is justly to be re-

garded as a matter of public concern. In fact, it was, in 1878, deemed by the people of the state to be of such public importance as to justify an amendment of the constitution of the state, wherein it was provided (by the amendment then made to section 31 of article 4 of the constitution of 1870) that the general assembly may provide for the organization of drainage districts, and vest the corporate authorities thereof with power to construct and maintain levees, drains, and ditches, and to keep in repair all drains, ditches, and levees theretofore constructed under the laws of this state, by special assessment upon the property benefited thereby. The act under which appellee was organized was passed in conformity with the provisions of this constitutional amendment. It will be noted that both the amendment and the act required that the objects to be effectuated by the drainage districts contemplated by them were to be accomplished with funds raised "by special assessment upon the property benefited thereby." The power to make special assessments is referable to and included within the taxing power: 2 Dillon on Municipal Corporations, sec. 596; Cooley on Taxation, 430; *White v. People*, 94 Ill. 604; *Allen v. Drew*, 44 Vt. 175. And one of the requisites of lawful taxation is, that the purpose for which contributions are demanded shall be public in their nature: Even the owner of the land benefited cannot be taxed to improve it, unless public considerations are involved, but must be left to improve it or not, as he may choose: 6 Am. & Eng. Ency. of Law, 10; *Loan Ass'n v. Topeka*, 20 Wall. 655; *People v. Supervisors*, 26 Mich. 22.

By the act under which appellee was organized, it was required, as a condition precedent to such organization, that a majority in number of the adult owners of lands lying in the proposed district, and who should also be the owners, in the aggregate, of more than one third of the lands in such district, should petition for its formation. It is insisted that for this reason the formation of the district was the voluntary affirmative act of the land-owners, and that its organization was for their benefit, and that therefore the corporation is, in its character and aims, essentially a private corporation, and in no sense a corporation *in invitum*. It would seem to be of the essence of a private corporation aggregate, that it is formed by the voluntary agreement of all its members, and that no person can be forced to become a member or stockholder therein *volens*. In the drainage district a bare majority

in number of the adult land-owners can compel all the land-owners who are minors, and the minority of adult land-owners, to become members of the corporation, and subject them to all the corporate burdens, against their will. So, also, the owners of lands which are barely more than one third of the aggregate lands in such district can make the owners of almost two thirds of such aggregate lands involuntary members, and render their property liable for assessments. To impose an additional burden upon such unwilling corporators, upon the express ground they are voluntary members of the district, is akin to irony. As matter of course, the organization is in part for the benefit of the land-owners in the district; for the special assessments which may be made are limited to the property actually benefited, and further limited the extent of such benefits; but, as we have already seen, there is also a public benefit, and that it is only by virtue of the drainage being a matter of public importance that the involuntary land-owner can be taxed for the improvement. The conclusion must be, that a drainage district formed under the statute in force July 1, 1879, is not a private corporation, but is a public corporation.

In *Commissioners v. Kelsey*, 120 Ill. 482, and in other cases, it has been held that drainage districts are to be classed as municipal corporations. It is manifest, however, that they are not municipal corporations proper, nor do we regard them as analogous to such corporations. In the case of an incorporated city, a perfect obligation is imposed by the law, and powers and means, full, ample, and adequate for the discharge of such duty, are given. A drainage district, however, is organized merely for a special and limited purpose. Its powers are restricted to such as the legislature has deemed essential for the accomplishment of such purpose, and it is only authorized to raise funds for the specific object for which it is formed, and can do that in no other mode than by special assessments upon the property benefited, which can in no case exceed the benefits to the lands assessed. No funds or means are furnished such district with which to pay damages occasioned to individuals by the tortious or unauthorized acts of the drainage commissioners, and there is no express statutory requirement that it shall be liable for such torts. The duty, then, which was incumbent upon appellee, to protect the lands of appellant through which its ditches passed from inundation, was a duty of imperfect obligation, and one for the

breach of which no action for damages lies against the district. The act under which appellee is organized is a general law, and applicable alike to all parts of the state, and under its provisions drainage districts may everywhere be formed. Appellee is to be regarded as a mere public involuntary *quasi* corporation, and the well-established and uniform doctrine is, that there is no corporate liability to respond in damages to an individual injured by the negligent or wrongful act of its officers, agents, or servants.

It is urged that it is provided in the bill of rights contained in the constitution of 1870, that private property shall not be taken or damaged for public use without just compensation. The act of 1879 makes provision for a jury trial, before a jury of disinterested freeholders, to ascertain the value of the land taken, and all damages consequent upon the construction of the proposed work, and also for the procurement by the drainage commissioners of releases in writing of the right of way, "which shall be a perpetual bar to all claims for damages by the grantor or grantors, or their assigns, on account of the construction of such work." Allowances for right of way and damages are required by the act to be paid or tendered to the land-owners before the commissioners are authorized to enter upon the land for the construction of any work thereon, and the amounts thus paid are a part of the entire cost of the work which is assessed upon the lands in the district. Adequate provision is therefore made for just compensation for all private property taken or damaged for public use. Since nothing is alleged by appellant to the contrary, it must be presumed that he was fully compensated for his lands taken for the ditch, and paid all damages consequent upon its construction for the purposes originally contemplated. If, however, by the enlargement of the district, an additional burden of water was precipitated upon his lands, to his detriment, it would seem that prior to the discharge of such additional water upon the lands the damages consequent upon such enlargement should have been assessed by a jury and paid by the district: *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ill. 439; 16 Am. Rep. 624; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507; 47 Am. Rep. 453. But in respect to the damages claimed in the declaration, they were either caused by the tortious act of the drainage commissioners in discharging the new and additional waters, which were not had in contemplation in the original assessment of damages

against the district, upon the premises of appellant, or occasioned by negligence or misconduct on the part of the commissioners, and the remedy must be personally against the commissioners. It would, as we have already seen, be inconsistent with the fixed rules of law to hold the district liable for the consequences of the illegal acts of such commissioners.

We find no error in the record. The judgment of the appellate court is affirmed.

LIABILITY OF PRIVATE CORPORATIONS FOR TORTS. — See note to *Orr v. Bank of United States*, 13 Am. Dec. 596-598; note to *Williams v. Planters' Ins. Co.*, 34 Am. Rep. 495-499; *Dunn v. Agricultural Soc.*, 46 Ohio St. 93; 15 Am. St. Rep. 556, and note; *Bauman v. Pere Marquette etc. Co.*, 66 Mich. 544; *Thomas v. Musical etc. Union*, 121 N. Y. 45.

MUNICIPAL CORPORATIONS — QUASI CORPORATIONS — LIABILITY FOR NEGLIGENCE. — For a discussion of the distinction made between municipal corporations proper, and towns and other *quasi* corporations, as to their liability to private actions for injuries caused by their negligence, see extended note to *Browning v. Springfield*, 63 Am. Dec. 350-355. Compare also *Kansas City v. Bradbury*, 45 Kan. 381; 23 Am. St. Rep. 731, and note; *Bates v. Rutland*, 62 Vt. 178; 22 Am. St. Rep. 95, and note; *Edgerly v. Concord*, 62 N. H. 8; 13 Am. St. Rep. 533, and note; *Moffitt v. Asheville*, 103 N. C. 237; 14 Am. St. Rep. 810; *Downing v. Mason County*, 87 Ky. 208; 12 Am. St. Rep. 473, and note; *Fry v. Albemarle County*, 86 Va. 195; 19 Am. St. Rep. 879, and note; *Dosdall v. Olmstead County*, 30 Minn. 96; 44 Am. Rep. 185; *Commissioners v. Martin*, 4 Mich. 557; 69 Am. Dec. 333. Counties can be sued for damages only when such suits are authorized by statute: *Monroe County v. Flynt*, 80 Ga. 489; *Grant County v. Lake County*, 17 Or. 453; *Lee County v. Yarbrough*, 85 Ala. 590. Towns are not liable for damages caused by the wrongful acts of its officers or agents: *Brown v. Guyandotte*, 34 W. Va. 299.

QUASI CORPORATIONS, WHAT ARE, AND THEIR LIABILITY FOR TORTS. — See note to *Todd v. Birdsall*, 13 Am. Dec. 525.

DRAINAGE — EMINENT DOMAIN. — The right to condemn land for drains rests upon the same foundation as the right of condemnation in cases of public roads, mills, railroads, school-houses, etc: *Norfleet v. Cromwell*, 70 N. C. 634; 16 Am. Rep. 787.

KUTTNER v. HAINES.

[135 ILLINOIS, 382.]

BILL OF REVIEW — CONDITIONS PRECEDENT TO RELIEF. — A person seeking to reverse a former decree for error of law appearing on its face must have performed it before filing a bill of review; as, if it be for land, the possession must be given up; and if for money, it must be paid; or if there are circumstances bringing him within the exceptions to the general rule, he must show them to the court, and obtain an order relieving him from performance before filing the bill.

BILL OF REVIEW — PERFORMANCE OF DECREE AS WAIVER. — The delivery of the possession of a house on leased premises, in obedience to a decree, will not operate as a waiver of homestead rights, or as a release of errors of law, nor will it deprive the party of the right to contest the validity of the decree by suing out a bill of review. On the other hand, obedience to the decree is necessary before the bill can be sued out.

BILL OF REVIEW IS NOT SUFFICIENT which only sets out a synopsis of the former bill or answer, but the bill, answer, replication, and decree must be set out. These constitute the record for the inspection of the court.

Rufus King, for the plaintiff in error.

S. Whipple Gehr, for the defendant in error.

CRAIG, J. This was a bill of review, brought by Kate T. Kuttner, to review and reverse a decree rendered in the superior court of Cook County in favor of Charles H. Haines, against her, on the sixth day of July, 1888.

Kate T. Kuttner, prior to the rendition of the decree sought to be reviewed, was the lessee of Haines of three lots in Chicago, under two ground-leases. Lots 25 and 26, upon which the lessee had erected a two-story frame dwelling, were embraced in one lease, and lot 44, upon which the lessee had erected a one-story brick store, was embraced in the other lease. In the month of March, 1888, Haines filed a bill in equity in the superior court, to enforce against the buildings on the leased premises the liens created by the terms of the leases, for unpaid rent and taxes. The bill charged two years' default in the payment of rent under the leases, and non-payment of taxes for the same time; that the lessee had forfeited the leases, and that the lessor had declared each of the leases determined and forfeited, and served a written notice of forfeiture on the lessee. The bill prayed that the complainant be decreed to have a lien on the buildings on the lots, that an account be had, and that the buildings should be sold to pay the rents and taxes due the complainant. An answer was put into the bill, to which a replication was filed. The cause was referred to the master, to ascertain the amount

due the complainant, and upon the filing of the report a decree was rendered requiring the payment of the amount due within two days, and on default of payment, the master in chancery was directed to sell the property at public auction, at the door of the court-house in Chicago, upon giving ten days' notice, by publication in a newspaper published in the city.

The complainant in the bill of review relied upon three grounds to impeach the decree: 1. Because the decree directed a sale of the property without protecting her homestead rights; 2. The decree was erroneous in allowing only two days for the payment of the amount found to be due; and 3. The decree of sale was erroneous in directing the sale of the property at the court-house, when it was situated two miles distant from the place of sale. The defendant, Charles H. Haines, appeared and filed a motion, in writing, to dismiss the bill of review, on two grounds: 1. Because complainant failed to show in her bill a compliance with the decree; and 2. Because the bill failed to set out a complete copy of the record sought to be reviewed.

The decree attempted to be reviewed required the possession of the buildings on the leased premises to be surrendered to the purchaser at the master's sale. The complainant was in the possession of the property when the decree was rendered and the sale made, but she did not surrender the possession of the property to the purchaser in obedience to the decree; and the first question to be considered is, whether the complainant can maintain a bill of review without performing the decree, or without obtaining an order of court dispensing with performance, before the filing of the bill.

The general rule is, that a party seeking to reverse a former decree for error of law appearing on the face of the decree must have performed the decree before filing a bill, or if there are circumstances bringing him within exceptions to the general rule, he must show them to the court, and obtain an order relieving him from performance before filing the bill. Story, in his work on equity pleading, section 406, says: "But by another of the instances above mentioned, the decree must be first obeyed and performed before a bill of review can be brought; as, if it be for land, the possession must be given up; if it be for money, the money must be paid; and so on in other cases."

In *Griggs v. Gear*, 3 Gilm. 2, this court held that before

filing a bill of review it was necessary that the party should pay the costs of the first case and perform the decree. It is there said: "It has been already stated, that before filing a bill of review the party who seeks to reverse the former decree must have performed it; as, if it be for a delivery of the possession of the land, he must have done so; or for the payment of money, he must have paid it. If, however, by complying with the decree he would extinguish a right, as the execution of an acquittance, or the like, or if the party shows himself absolutely unable to comply with the decree, as, for instance, where he is required to pay a sum of money, and he is insolvent, he may show the facts to the court, and get relieved from the performance before he filed the bill. In this case it does not appear that the parties have performed the decree, nor was previous leave given to file this bill without performance, although the complainants aver in this bill their inability to perform it." The same general rule was announced in *Judson v. Stephens*, 75 Ill. 255.

It is, however, claimed, as an excuse for failing to perform the decree, that a surrender of possession would be a waiver of her homestead rights in the property. We do not regard the position tenable. This court has expressly held that payment of a judgment before execution issued did not operate as a release of errors: *Page v. People*, 99 Ill. 425. Upon the same principle, a surrender of the possession of the property in obedience to the decree would not deprive the complainant of the right to contest the validity of the judgment by suing out a writ of error or bill of review.

The bill of review set out a copy of the decree, but it contained no copy of the bill, amended bill, or answer. As to these documents, which were an essential part of the record to be reviewed, we find a mere statement in the bill of what the pleader regarded the substance of the bill, answer, and amended bill. In Story's Equity Pleading, sec. 420, in speaking in reference to the frame of a bill of review, the author says: "In a bill of this nature, it is necessary to state the former bill, and the proceedings thereon, the decree, and the point in which the party exhibiting the bill of review conceives himself injured by it." If it is necessary to state the former bill, as declared by Story, a statement by the pleader of what he may regard the substance of the former bill does not answer the requirements of the law.

The question is not, however, a new one in this court. As

early as *Turner v. Berry*, 3 Gilm. 544, the quotation *supra*, from Story, was cited with approval, and it was said: "From the very nature of the proceeding, it is manifestly necessary to state all of the proceedings in the original cause, except the evidence on which the court found the facts on which it proceeded to render a decree." What was said in the case cited was approved in *Gardner v. Emerson*, 40 Ill. 297. In *Judson v. Stephens*, 75 Ill. 255, the question arose in regard to the sufficiency of a bill of review, and it was held, following previous cases, that a bill which fails to set out a copy of the bill, answer, and decree to be reviewed is defective. Again, in *Goodrich v. Thompson*, 88 Ill. 207, it was held indispensable necessary to a bill of review, that the former bill, and the the proceedings thereunder, and the decree, be fully set out or stated. A synopsis thereof is not sufficient. The same rule was again declared in *Aholtz v. Durfee*, 122 Ill. 286.

So far, therefore, as this state is concerned, the doctrine may be regarded as well settled, that a bill of review is not sufficient which only sets out a synopsis of the former bill or answer, but the pleader must set out the bill, answer, replication, and decree. This constitutes the record for the inspection of the court.

We think the judgment of the circuit court holding that the bill was insufficient was correct, and the judgment of the appellate court will be affirmed.

BILL OF REVIEW — PERFORMANCE OF DECREE. — As to the necessity for a performance of the decree before a bill of review can be brought, see note to *Brewer v. Bowman*, 20 Am. Dec. 173.

RANDALL v. RANDALL.

[135 ILLINOIS, 398.]

TRUST BY IMPLICATION. — No trust will be implied merely from words indicating the motives inducing a gift. Whenever the disposition of the property by will or otherwise imports absolute and uncontrolled ownership, and a clear discretion and choice to act or not to act is also given, equity will not construe a trust from the language employed.

WILLS — CONSTRUCTION — PRECATORY TRUSTS. — When a testatrix bequeaths to her husband, the father of her children, "all my property, whether real, personal, or mixed, that he may use the same for the maintenance and education of my said children, and that he may, from time to time, advance to each, as he may deem best, to start them in life," and "I do hereby appoint my beloved husband my executor, with

full power to control, manage, use, convey, sell, and dispose of said property as his own absolute property, without being required to file or render any account or give any bail," the husband will take an absolute estate, not subject to any trust in favor of such children.

Charles F. Goodspeed, A. F. Knox, and G. B. Garnsey, for the appellants.

R. E. Barber, for the appellee.

SCHOLFIELD, C. J. The question here is, whether the following clauses of the last will and testament of Mary E. Randall, deceased, vested the title of the property whereof she died seised or possessed in her husband, Sylvester W. Randall, absolutely, or only in trust for the children of the testator, namely: "2. To provide, to the extent of my ability, for the support and education of such of my children as shall be unmarried and minors, and such of the married or adult ones as may, by innocent misfortune, become really needy, I give and bequeath to my beloved husband, Sylvester W., the father of my children, all my property, whether real, personal, or mixed, that he may use the same for the maintenance and education of my said children, and that he may, from time to time, advance to each of them, as he may deem best, to start them in life. 3. I do hereby appoint my beloved husband my executor, with full power to control, manage, use, convey, sell, and dispose of said property as his own absolute property, without being required to file or render any account or give any bail."

No trust can be implied merely from the words indicating the motives which induced the gift: *Bryan v. Howland*, 98 Ill. 630; *Giles v. Anslow*, 128 Ill. 196; Perry on Trusts, sec. 119. And the rule is, wherever the prior disposition of the property imports absolute and uncontrolled ownership, and also wherever a clear discretion and choice to act or not to act is given, equity will not construe a trust from the language employed: 2 Story's Eq. Jur., sec. 1070; Hill on Trustees, 4th Am. ed., 119, *74; *Mills v. Newberry*, 112 Ill. 135; 54 Am. Rep. 213.

It will be observed that the gift here is absolute in form, and the last clause puts it beyond doubt that the right to use, sell, and dispose of is intended to be as absolute owner. No specific interest is defined as that which it was intended any child should take; but whether one or all is or are to take any, and if any, how much, is to be determined by the uncon-

trolled judgment and discretion of the husband. He may use the property and sell and dispose of it "as his own absolute property, without being required to file or render any account or give any bail." He can have no more perfect dominion over property acquired from any source. If he cannot be required "to file or render any account or give any bail," no one can be entitled to assert an antagonistic interest in the property: *Howard v. Carusi*, 109 U. S. 725.

The decree below is affirmed.

TRUSTS BY IMPLICATION IN WILLS.—Ordinarily no trust will arise where a devise is made to one standing in the relation of a parent, as such directions generally relate only to the motive of the testator or donor: *Elliott v. Elliott*, 117 Ind. 380; 10 Am. St. Rep. 54, and note; *Small v. Field*, 102 Mo. 105; *Sale v. Thornberry*, 86 Ky. 266. A mere expression of a desire that the donee should educate, provide for, or do justice to a certain class of persons will raise no trust: *Giles v. Anslow*, 128 Ill. 188; *Wilmoth v. Wilmoth*, 34 W. Va. 426. See extended note to *Knox v. Knox*, 48 Am. Rep. 494-499. See also *Harrison v. Harrison*, 2 Gratt. 1; 44 Am. Dec. 364, and extended note thoroughly discussing the subject of precatory trusts.

BARTON v. PEOPLE.

[135 ILLINOIS, 405.]

FALSE PRETENSES — SUFFICIENCY OF INDICTMENT. — An indictment for obtaining goods by false pretenses, charging that the accused, by falsely representing that he had money in bank, thereby induced another to accept a check in payment for goods sold and delivered, is sufficient. An additional averment that the accused represented that he would give a check different from the one given, though unnecessary, is not an averment that he issued such different check, and does not vitiate the indictment; and a further averment, characterizing the check issued as "a false token" and "a false writing" may be disregarded as surplusage, as it neither adds to nor detracts from the material allegation charging the gist of the offense.

FALSE PRETENSES — EVIDENCE. — Under an indictment charging the obtaining of goods by false pretenses, proof that the goods were in the possession of an agent of the party defrauded, and named in the indictment as the owner, at the time they were obtained by the accused, is sufficient proof of the ownership of the goods, if the title of the party named is not disputed.

FALSE PRETENSES — EVIDENCE. — On the trial of an indictment for obtaining goods by false pretenses, evidence that the accused agreed to pay cash, obtained from a certain bank, for goods upon delivery, but that upon delivery he gave the seller, without explanation, a check on said bank in payment, sufficiently establishes that he obtained the goods by representing that he had sufficient money in such bank to pay the check on presentation.

C. Stuart Beattie, for the plaintiff in error.

George Hunt, attorney-general, *Joel M. Longenecker*, state's attorney, and *Edward E. Gray*, assistant state's attorney, for the people.

SCHOLFIELD, C. J. Plaintiff in error was convicted of obtaining goods under false pretenses. The indictment contained several counts, but since the conviction was under the second count alone, no question arises in regard to the others.

One of the errors assigned is, that the court erred in overruling a motion to quash that count. Beyond question, the count is liable to criticism. Its statements are unnecessarily prolix, involved, and obscure. Nevertheless, we think it is therein charged, in substance, and with sufficient certainty to meet the requirement of our statute in regard to indictments for statutory offenses, that plaintiff in error, by falsely representing to one Pape, the agent of the H. C. Staver Manufacturing Company, that he owned \$175 in money, then on deposit with the Security Loan and Savings Bank, which would be paid by that bank on his own order, induced said Pape to accept an order drawn by him on that bank, for \$175, in payment for one buggy and two robes then negotiated to be sold to the plaintiff in error by said H. C. Staver Manufacturing Company, and in the hands of said Pape for the purpose of being delivered to the plaintiff in error upon plaintiff in error making payment therefor, and to deliver said buggy and two robes to said plaintiff in error as having been thereby paid for by said plaintiff in error, when in truth and in fact plaintiff in error did not then have \$175, or any other sum, on deposit with the said Security Loan and Savings Bank, which would be paid by that bank on his order for the payment of \$175, as plaintiff in error well knew.

It is objected that two orders are described in the count as having been issued, and that it is only negatived that one of the orders was drawn against money on deposit whereby it could be paid. As we understand the allegations, this is a misapprehension. It is, we concede, alleged, but unnecessarily, that plaintiff in error represented that he would issue an order different from that set out *supra*, and that, instead of in fact doing as thus represented, he issued that order. There is no allegation that he actually issued an order as he represented he would.

It is also objected that the mere fact that plaintiff in error

drew an order on a bank where he had neither credit nor money is not, as the order here issued is characterized, "a false token" or "a false writing." But the gist of the offense here charged is the obtaining of the possession of the goods by the plaintiff in error, by falsely representing that he had money in the bank wherewith to pay an order drawn by him upon the bank for the amount due upon the goods, and delivering the order copied *supra*, as such order, when in truth and in fact, as he well knew, he did not have the money in the bank as represented. The other allegations as to the character of the order were superfluous. They neither add to nor detract from the material allegations, and are therefore to be disregarded, because they are surplusage: See Crim. Code, div. 1, sec. 96; 1 Starr and Curtis's Ann. Stats. 781; *Smith v. People*, 47 N. Y. 303.

It is contended that the evidence fails to show that the goods obtained were the property of the H. C. Staver Manufacturing Company, as alleged. We do not concur in this view. The evidence shows the negotiation of a sale of the property by an agent of the H. C. Staver Manufacturing Company to plaintiff in error, and the possession of the property by an agent of that company, to be delivered to plaintiff in error pursuant to such sale. Since possession alone tends to prove ownership (1 Greenl. Ev., sec. 34), we think, in the absence of evidence raising any question of title as alleged, this was sufficient.

The final objection is, that the evidence does not sustain the verdict. The evidence shows, beyond controversy, that plaintiff in error negotiated with the agent of the H. C. Staver Manufacturing Company for the purchase of the property described in the count, for cash, to be paid at the time of the delivery of the property; that he directed that the property should be sent to his place of business not earlier than four o'clock of the day on which the negotiation was had, representing that by that time he would obtain the money from the bank wherewith to make payment; that the property was sent by one Pape, an agent of the H. C. Staver Manufacturing Company, to plaintiff in error's place of business, at the hour indicated, to be delivered; that plaintiff in error then delivered to Pape, without any explanation, the order copied *supra*, which Pape accepted without examination, and then delivered the property negotiated for to plaintiff in error, and that plaintiff in error had not money on deposit with the bank on which the order was drawn, or any arrangement with the bank by which the

order would or should be paid, as he well knew. The promise to pay cash for the property upon delivery, coupled with the delivery of the order without explanation, was, in our opinion, in effect, a representation that plaintiff in error had the amount of money called for by the order upon deposit with the bank, which the bank would pay to the manufacturing company upon presentation of the order. He was to make a cash payment, and he delivered the order as such payment, which necessarily assumed the ownership of that much money on deposit with the bank.

We are unable to say that the verdict was not warranted by the evidence, and the judgment must therefore be affirmed.

Crime of Obtaining Goods or Money by False Pretenses.*

Elements and Definitions of the Crime. — To constitute the offense of obtaining money or goods under false pretenses, four things must occur, namely, there must be an intent to defraud, actual fraud, false pretenses used for perpetrating the fraud, which must be accomplished by means of the false pretenses as a cause which induced the owner to part with the property: *People v. Wasservogle*, 77 Cal. 173; *People v. Wakely*, 62 Mich. 297. The crime has otherwise been defined to consist in inducing the owner to part with goods or money, either by willful falsehood, or by the offender's assuming a character he does not sustain, or by representing himself to be in a situation he knows he is not in: *People v. Haynes*, 14 Wend. 546; 28 Am. Dec. 530. To constitute the offense, there must be an acquisition of property by means of some false or deceitful pretense or device, or fraudulent representation, and the title to the property must pass from the injured party to the accused: *Sims v. State*, 28 Tex. App. 447; *Canter v. State*, 7 Lea, 349. An intent to defraud is an essential element of the crime: *State v. Oakley*, 103 N. C. 408; *State v. Garis*, 98 N. C. 733; *State v. Fields*, 118 Ind. 491. The crime consists in obtaining the property with a fraudulent intent; the false pretenses employed are only the means by which the offense is perpetrated: *Commonwealth v. Van Tuyl*, 1 Met. (Ky.) 1; 71 Am. Dec. 455. The making of the false pretense or representation is not of itself criminal, and it becomes so only by being accompanied with a fraudulent intent, which is of the substance of the crime: *Commonwealth v. Jeffries*, 7 Allen, 548; 83 Am. Dec. 712. The pretenses must be false, and made with a design of obtaining the money or property, which must be paid to or received by the accused in consequence of the false pretenses: *Bowler v. State*, 41 Miss. 570.

The false representation need not be made for the purpose of accomplishing the particular thing which does result. A false pretense, such as would tend to produce the result accomplished, an obtaining thereby, and designedly, a thing of value from another, and an intention by the transaction to defraud that other, are the only elements of the crime. And if a particular result is designed to be accomplished by making the false pretense, and it fails, while another thing of value is obtained and accepted with intent to

* REFERENCE TO MONOGRAPHIC NOTES.

False pretenses, crime of obtaining money or property by: 33 Am. Rep. 91, 95; 40 Am. Rep. 75-80.

False representations, when actionable: 18 Am. St. Rep. 555-563.

defraud, the law imputes to the person making such pretense a design from the beginning to accomplish the latter result: *Todd v. State*, 31 Ind. 514.

False Representation or Pretense, What is. — A false representation or pretense is a representation of some fact or circumstance, calculated to mislead, which is not true; or in other words, such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value. Such pretense need not be in words, but may be gathered from the acts and conduct of the party: *People v. Wasservogel*, 77 Cal. 173; *Jackson v. People*, 126 Ill. 139; *State v. Vandimark*, 35 Ark. 396; *State v. Haines*, 23 S. C. 170. So if a false representation is made in regard to an article, and money is thereby obtained, the crime is complete, even though it is necessary to apply tests or experiments to the article to ascertain whether the representation is false or not: *In re Greenough*, 31 Vt. 279. A false representation of an existing fact, calculated to deceive, and which does deceive, and is intended to deceive, whether the pretense is in writing, or oral, or in acts, by which one man obtains value from another without compensation, is a criminal false pretense: *State v. Phifer*, 65 N. C. 321; *State v. Dixon*, 101 N. C. 741-743.

Future Events, Representations concerning. — One of the essential elements of the crime of obtaining money or property by false pretense is, that the false pretense or representation shall be of a past event or of an existing fact. No representation of a future event, whether in the form of a promise or not, can be a criminal pretense: *State v. Tull*, 42 Mo. App. 324; *State v. De Lay*, 93 Mo. 98; *State v. Colly*, 39 La. Ann. 841; *Commonwealth v. Wallace*, 114 Pa. St. 405; 60 Am. Rep. 353; *In re Snyder*, 17 Kan. 542; *Keller v. State*, 51 Ind. 111; *Commonwealth v. Moore*, 89 Ky. 542; *State v. Magee*, 11 Ind. 154; *Jackson v. People*, 126 Ill. 139; *Dillingham v. State*, 5 Ohio St. 281; *Johnson v. State*, 41 Tex. 65; *Canter v. State*, 7 Lea, 349; *State v. Haines*, 23 S. C. 170. Hence where one advances money to a laborer on his promise to work it out, which he afterwards refuses to do, he is not guilty of obtaining the money under false pretenses: *Ryan v. State*, 45 Ga. 128. So where one is dishonest, and purchases goods under a promise to pay for them, but without intending to do so, this does not constitute the crime: *Tefft v. Windsor*, 17 Mich. 485. So where horses are sold to defendant on credit, the seller taking a note for the price, relying on the defendant's promise to resell the horses to pay the first purchase price, the crime is not made out, although the defendant may have falsely represented his present ability to pay: *People v. Mauritzen*, 84 Cal. 37. So where the defendant, on presentation of his board-bill, falsely represented that he was expecting money every day with which to pay it, and on the strength of such representation obtained further credit for board, all of the board having been obtained without any prior agreement as to time of payment, the defendant was decided to not be guilty of obtaining goods by means of false pretenses: *State v. Black*, 75 Wis. 490; *State v. Tull*, 42 Mo. App. 324.

The Pretense must have Induced Belief. — To make the pretense criminal, it must not only relate to a past event or a present existing fact, and not to a promise or something to happen in future, but the party injured must also believe the pretense to be true, and, confiding in its truth, must, by reason of such confidence, part with his money or property: *State v. Evers*, 49 Mo. 542; and it may relate to quality, quantity, or the nature or other incident of the article offered for sale, whereby the purchaser, relying on such false representation, is defrauded: *Jackson v. People*, 126 Ill. 139; or the promise and pretense may blend together and still be criminal, if they jointly act

upon the defrauded person and induce him to give faith to the pretense: *State v. Dowe*, 27 Iowa, 273; 1 Am. Rep. 271.

Pretense not Sufficient to Deceive Prudent Persons. — The better opinion would seem to be, that the false pretense relied upon as true need not be such as would be guarded against by a person of ordinary care and prudence: *People v. Haynes*, 14 Wend. 546; 28 Am. Dec. 530; *State v. Fooks*, 65 Iowa, 196; *Johnson v. State*, 36 Ark. 242; *Smith v. State*, 55 Miss. 514; *Bowen v. State*, 9 Baxt. 45; 40 Am. Rep. 71. The contrary doctrine is, however, maintained by some authorities: *State v. Burnett*, 119 Ind. 392; *State v. Magee*, 11 Ind. 154.

False Statement Made True before being Acted upon. — A pretense which is false when made, but true, by the act of the maker of it, when the prosecutor relies thereon and parts with his property, is not a criminal false pretense: *In re Snyder*, 17 Kan. 542.

False Pretense Which is Part Only of the Means Operating. — It is not necessary, to constitute the crime, that the owner has been induced to part with his property solely and entirely by false pretenses, nor need the pretenses be the paramount cause of the delivery of the property to the accused; for it is sufficient if they are part of the moving cause, and without them the defrauded party would not have parted with the property. The falsity of every pretense made is not essential to the crime. It is enough that a material part of the pretense was false, that it was made with intent to defraud, and that it induced the party sought to be wronged to part with his property: *Beasley v. State*, 59 Ala. 20; *In re Snyder*, 17 Kan. 542; *State v. Thatcher*, 35 N. J. L. 445; *People v. Haynes*, 14 Wend. 557; 28 Am. Dec. 530; *People v. Herrick*, 13 Wend. 88.

Intent, Presumption of. — Where property is obtained by an alleged false pretense, the falsity of the representation, if established, will raise a presumption of an intent to defraud: *People v. Herrick*, 13 Wend. 88; *Jackson v. People*, 126 Ill. 139.

The Value of the Thing Obtained is not an essential of the crime of obtaining money or property by false pretenses. One may be punished, however small the value of the property obtained: *Jackson v. Commonwealth*, 86 Ky. 1.

Illustrations of False Pretenses. — Among the many cases where false pretenses have been deemed sufficient to constitute the crime of obtaining property or money by false pretenses, the following may be enumerated: An influential and intentionally false representation, by the seller to the purchaser of a horse or mule, that he is sound or possesses certain other qualities, the falsity not being apparent, or if apparent, falsely explained: *State v. Stanley*, 64 Me. 157; *Watson v. People*, 87 N. Y. 561; 41 Am. Rep. 397; *State v. Wilkerson*, 103 N. C. 337; *State v. Burke*, 108 N. C. 750; *Jackson v. People*, 126 Ill. 139; a bank check drawn by defendant in favor of the person alleged to have been defrauded, and in payment of property obtained, the defendant knowing when he gave the check that he had neither funds to meet it, nor credit at the bank upon which it was drawn, and that it would not be paid upon presentation: *People v. Donaldson*, 70 Cal. 116; *Commonwealth v. Drew*, 19 Pick. 179; *Maley v. State*, 31 Ind. 192; *Smith v. People*, 47 N. Y. 303; *Commonwealth v. Devlin*, 141 Mass. 423; false representations made by a merchant in obtaining goods, as to existing facts, regarding his present ability to pay for them: *Rothschild v. State*, 13 Lea, 299; *Smith v. State*, 55 Miss. 513; *Clifford v. State*, 56 Ind. 245; the obtaining of a signature or an indorsement to a promissory note, by false pretenses, and with a fraudulent intent to obtain money upon it, whether the note is negoti-

able or not, and whether the money was actually obtained or not: *People v. Stone*, 9 Wend. 181; *People v. Herrick*, 13 Wend. 87; *People v. Genung*, 11 Wend. 18; *Dillingham v. State*, 5 Ohio St. 280; *State v. Pryor*, 30 Ind. 350; *State v. Porter*, 75 Mo. 171; or where one, by means of false pretenses, induces another to buy property from him, and thereby obtains the signature of the buyer to a good check in payment: *Tarbox v. State*, 38 Ohio St. 581; a false representation by which money is paid to another at the request of defendant and in payment of his debt: *Sandy v. State*, 60 Ala. 58; a false promise to repay money thereby obtained, when coupled with a false representation as to property owned by the person making it: *State v. Montgomery*, 56 Iowa, 195; the obtaining of money, on the false pretense, by defendant, that his brother is to arrive with money for him, with which he will repay the sums borrowed: *State v. Fooks*, 65 Iowa, 196; a false representation by a mortgagor that he was procuring a loan from another to pay the notes and mortgage held by the mortgagee made to the latter, together with the false pretense that he had come to him for the purpose of paying them, whereby he obtained possession of both the notes and the mortgage of the mortgagee: *State v. Cowdin*, 28 Kan. 269; falsely representing one's self to be the owner of property which does not belong to him, and thus fraudulently inducing the owner to sell the goods on credit: *People v. Kendall*, 25 Wend. 399; *Commonwealth v. Lee*, 149 Mass. 179; obtaining money as a charitable gift by means of false representations: *Commonwealth v. Whitcomb*, 107 Mass. 486; as that goods were needed to bury a sister-in-law's child who had just died: *State v. Matthews*, 91 N. C. 635; falsely representing that the stock of a corporation was selling at a certain price, but not in representing that it was worth a certain price: *Commonwealth v. Wood*, 142 Mass. 459; a false and fraudulent statement by the president of a bank that it is perfectly solvent: *Commonwealth v. Wallace*, 114 Pa. St. 405; 60 Am. Rep. 353; willfully false and fraudulent representations, made to induce the sale of railroad bonds, that they were of a certain market value, and that a bank would lend that amount on them, and that the railroad was in running order and paying expenses: *People v. Jordan*, 66 Cal. 10; 56 Am. Rep. 73; falsely-representing one's title to be good, when he knows it is bad, with intent to deceive and defraud, thereby succeeding in cheating another out of his property: *People v. Hamberg*, 84 Cal. 469; obtaining goods by false representations that defendant has a certain sum of money, partly paid and partly to be received in right of his wife: *Commonwealth v. Burdick*, 2 Pa. St. 163; 44 Am. Dec. 186; falsely and fraudulently representing one's self to be a member of a Masonic lodge in one state, on his way to a funeral and out of money, and exhibiting a forged receipt from his lodge for dues, thereby obtaining money from a Masonic lodge in another state, upon a promise to repay the same: *Strong v. State*, 86 Ind. 208; 44 Am. Rep. 292; a false and fraudulent representation by defendant as to his place of residence, if the defrauded party relied thereon and it formed a controlling inducement, otherwise not: *Woodbury v. State*, 69 Ala. 242; 44 Am. Rep. 515; obtaining property by falsely pretending to have purchased a farm in the neighborhood: *State v. Fooks*, 65 Iowa, 452; falsely representing one's self to be the owner of land, and selling it and obtaining the money therefor, by pointing out valuable property to a purchaser as that sold him, while the property conveyed is worthless: *State v. McConkey*, 49 Iowa, 499; selling barrels of crude turpentine, representing them to be just as good at the bottom as at the top, when they contained only a small quantity of turpentine on the top of each, the remainder of the contents being chips and dirt:

State v. Jones, 70 N. C. 75; a false assertion of confidence that one can secure a place for another, accompanied by promises to do it, and by other false devices, all of which induced the latter to part with his property: *People v. Winslow*, 39 Mich. 505; falsely and fraudulently representing that, from a certain recipe of which defendant was the owner, a compound could be produced which would be a non-explosive burning fluid, and by which representations he induced another to purchase the recipe and pay him therefor: *In re Greenough*, 31 Vt. 279; advertising to give an exhibition as a mesmerist, and distributing handbills giving notice of defendant's proposed exhibition, renting a hall, and at the appointed time standing in the ticket-office, selling tickets of admission and collecting the money therefor until the time for the exhibition to begin, and then absconding: *State v. Sarony*, 95 Mo. 349; obtaining money, from the mother of a boy confined in jail, by falsely representing that the boy was threatened with mob violence; that it was necessary, in order to protect him, to remove him to the jail of another county; that defendant had been employed as his counsel, and needed the money to effect the removal: *Commonwealth v. Moore*, 89 Ky. 542; obtaining credit on false representations of being a storekeeper: *Higler v. People*, 44 Mich. 299; 38 Am. Rep. 267; falsely representing one's self to another as being an officer with a warrant for his arrest for forgery, with power to compromise the offense, and by such representations and threats to arrest, obtaining from such other money and a promissory note for not making the arrest: *Perkins v. State*, 67 Ind. 270; 33 Am. Rep. 89, and note 94; falsely pretending to an ignorant negro that defendant was a practicing physician, and that he had restored sight to a blind man, that the negro's house was infected with poison, that his sick granddaughter was poisoned, and that defendant could remove the poison for pay, thereby obtaining money from the negro to remove the poison: *Bowen v. State*, 9 Baxt. 45; 40 Am. Rep. 71.

Whether the False Pretense must be Calculated to Deceive a Prudent Person.

—A false pretense, token, or writing, to be criminal, must, it has been held, be of a nature to deceive, and such as the victim, under the circumstances, may rely upon. Therefore, as an appointment to sell corn is not assignable, an assignee, being bound to know this, has no right to rely upon a representation that the transfer would vest in him the title to the corn or the power to sell it. As before announced, some of the cases maintain that a false pretense is not criminal unless calculated to deceive persons of ordinary prudence and discretion: *Commonwealth v. Grady*, 13 Bush, 285; 26 Am. Rep. 192; *People v. Williams*, 4 Hill, 9; 40 Am. Dec. 259. Thus it has been decided that where defendant falsely and fraudulently represented that he owned property free from encumbrance, when in fact there was a recorded mortgage against the property, and by such representation obtained money from one who was ignorant of the mortgage, the defendant was not guilty of obtaining the money by false pretense, because the party from whom it was obtained had the means of detection at hand: *Commonwealth v. Grady*, 13 Bush, 285; 26 Am. Rep. 192. So where cotton was sold under a false representation that it was "good middling," it was held that the rule of *caveat emptor* applied, and that defendant could not be convicted for the false pretense: *State v. Young*, 76 N. C. 258. The better rule, however, is believed to be, that defendant is guilty if he knows or has reason to believe that his false representations are relied upon in obtaining the money or property, or as grounds of credit: *People v. McAllister*, 49 Mich. 12; *State v. Hurst*, 11 W. Va. 54.

Receiver of Money Obtained by the False Pretenses of Another. —One is not

guilty by merely being present when money is received and taking part of it, even if he knows that it was obtained through the false representations of another: *People v. Cline*, 44 Mich. 290. So if one, acting honestly, receives all the money obtained by the false pretenses of another, the latter cannot be convicted, because, though he was guilty of a false pretense, the result accomplished by it was the securing of money or property by one who was entitled thereto: *Bracey v. State*, 64 Miss. 26.

Obtaining Satisfaction of One's Debt due to another, by false pretenses, no money passing, is not indictable: *Jamison v. State*, 37 Ark. 445; 40 Am. Rep. 103.

True Pretense Believed to be False. — If the pretense used is not false, though the person employing it believes it to be so, there is no criminal offense: *State v. Asher*, 50 Ark. 427.

Property must be Parted with and Some Person Defrauded. — The party defrauded must be induced by the false pretense to actually part with his property before any crime is committed: *McCord v. People*, 46 N. Y. 470. Where one, desiring to board with an acquaintance of his, who was visiting there, went to a certain hotel, whose proprietor told him that he knew his friend, that he had been boarding him for some time, but that he had left town, all of which was false, and by means of which the prosecutor was induced to pay the hotel-keeper a month's board in advance, — this was held not to be a case of false pretenses, as the prosecutor could get full value for the money expended: *Morgan v. State*, 42 Ark. 131; 48 Am. Rep. 55.

Mere Concealment is not a False Pretense. — One who gives an order on his employer for wages to become due him, and subsequently collects them himself, concealing the fact of having given the order, is not guilty of obtaining money under false pretenses: *Moulden v. State*, 5 Lea, 577.

Obtaining Property to Which One is Entitled. — An agent who obtains property belonging to his principal, and to the immediate possession of which the latter is entitled, by means of false representations made to a third party, is not guilty of obtaining the property by false pretenses: *In re Cameron*, 44 Kan. 64; 21 Am. St. Rep. 262, and note 265.

Obtaining Charitable Donations by False Representations is not indictable, because it does not affect a matter of trade or credit: *People v. Clough*, 17 Wend. 351; 31 Am. Dec. 303.

Obtaining a Judgment by. — A divided court decided that a person who by false representations obtained the consent of a city to the entry of judgment in his favor in a suit against it, and thereby obtained a sum of money from the city in satisfaction of the judgment, was not guilty of obtaining the money by false pretenses: *Commonwealth v. Harkins*, 128 Mass. 79.

False Statements Believed to be True. — One who obtains money by false representations, induced by his misapprehension of the facts, is not guilty of the crime, because of the absence of a criminal intent: *State v. Garrie*, 98 N. C. 733.

Intent or Ability to Repair the Wrong Done. — An intent to repay money obtained by false pretenses does not relieve the offense of its criminality: *Buntain v. State*, 15 Tex. App. 515; nor is ability to repay any defense in such case: *Commonwealth v. Coe*, 115 Mass. 481; *Spaulding v. Knight*, 116 Mass. 148; nor is the fact that one is personally liable on his assignment of an instrument any defense for obtaining money under false pretenses by means of the assignment: *Territory v. Ely*, 6 Dak. 128. Nor is it any defense that the party defrauded made false representation as to the goods

obtained by the false pretenses, nor that the goods were of less value than alleged: *Commonwealth v. Morrill*, 8 Cush. 571.

Indictment—Necessary Averments.—An indictment for obtaining goods or money by false pretenses must allege that the accused represented that certain facts existed, and that such representations caused the owner to part with his property, and that the statements which thus induced the owner to part with his property were untrue: *State v. Tomlin*, 29 N. J. L. 13. In other words, the indictment must show what the false pretenses were; that they were made or authorized by defendant; that they were false and fraudulent, and deceived the prosecutor; and what was obtained by and under them: *Parker v. Armstrong*, 55 Mich. 176. Or, as differently expressed, the indictment must set out the pretenses, the *scienter*, and that by means of the pretenses, which were false, the defrauded party was induced to part with the property described: *Mathena v. State*, 15 Tex. App. 473; *Commonwealth v. Bracken*, 14 Phila. 342; *State v. Neimeier*, 66 Iowa, 634; *State v. Philbrick*, 31 Me. 401; *State v. Mickle*, 94 N. C. 843. The averments necessary to a valid indictment are stated in *Johnson v. State*, 75 Ind. 553, to be, the specification of the pretenses, the goods or money obtained, and from whom; also, to negative the pretenses, aver defendant's knowledge of their falsity, and show the connection between them and the fraud accomplished by their means.

It is essential to the indictment that it allege that the defendant made the pretenses with a knowledge of their falsity: *State v. Blauvelt*, 38 N. J. L. 306; *State v. Hurst*, 11 W. Va. 54; *Maranda v. State*, 44 Tex. 442; *State v. Jansan*, 80 Mo. 97; and with an intent to defraud: *Jones v. State*, 22 Fla. 532; *State v. Small*, 31 Tex. 184; *Stringer v. State*, 13 Tex. App. 520; *State v. Smallwood*, 68 Mo. 192. Thus an indictment charging that defendant willfully, falsely, and fraudulently pretended to the prosecutor that he had cut for him, for the use of another, twenty cords of wood, whereas in fact he had not cut the same, and by means of such false pretense did obtain from the prosecutor certain described money with intent to defraud, is sufficient without alleging a felonious intent: *State v. Eason*, 86 N. C. 674.

The indictment must also state what the false pretenses are, and must allege them in such terms that the court can determine whether or not the crime is within the statute, and also with such certainty that the defendant may ascertain whether they constitute an indictable offense or not: *State v. Lambeth*, 80 N. C. 393; *People v. McKenna*, 81 Cal. 158; *State v. Porter*, 75 Mo. 171; *Clackan v. Commonwealth*, 3 Met. (Ky.) 332; *People v. Gates*, 13 Wend. 311; *State v. Bonnell*, 46 Mo. 395; *State v. McChesney*, 90 Mo. 120. The pretense need not, however, be set out in the exact words of the statute, for it is sufficient if it is plainly and sufficiently made out in any form of words: *Commonwealth v. Drew*, 153 Mass. 588. An indictment alleging that defendant falsely represented that he owned certain described personal property, with intent to borrow money of another, and that he offered to mortgage the same as security for the money, and that such other person, relying on the truth of such pretenses, loaned the money to defendant in consideration of the mortgage, sufficiently alleges the false pretenses, and that the money was loaned by reason thereof: *Commonwealth v. Lincoln*, 11 Allen, 233. So an indictment alleging as a false pretense that a false coin was represented as good and current coin, and that the prosecutor, being deceived thereby, was induced to deliver to defendant good coin in exchange therefor, sufficiently alleges the false pretenses: *Commonwealth v. Nason*, 9 Gray, 125.

If an indictment sets out the false pretenses with such certainty as to

clearly bring them within the statute, it is not essential that all the details of the fraud should be stated: *People v. Oyer and Terminer*, 83 N. Y. 436. And if there are several false pretenses, only one of them need be set out in the indictment: *State v. Vandimark*, 35 Ark. 396.

If an indictment states an offense with proper precision and formality, it will not be quashed on the ground that it contains some immaterial allegations, or that some one of the pretenses charged is not properly set out: *Commonwealth v. Parmenter*, 121 Mass. 354; *Commonwealth v. Stevenson*, 127 Mass. 446.

Where the money or property is obtained by the use of a false or defective written instrument, it is not essential that its tenor should be stated at length, but it must be set out with sufficient precision to indicate its nature and contents: *Commonwealth v. Coc*, 115 Mass. 481; *Oliver v. State*, 37 Ala. 134; *State v. Blizzard*, 70 Md. 385; 14 Am. St. Rep. 366. The indictment must disclose in what particular the instrument is defective: *State v. Dyer*, 41 Tex. 520; and it must also allege that the instrument was the consideration upon which the defrauded party parted with his property: *Lutton v. State*, 14 Tex. App. 518.

Where an indictment charges as part of the false pretenses that certain real estate was falsely represented to be free from encumbrances, the prior encumbrances should be set out or described: *Keller v. State*, 51 Ind. 111. The indictment need not allege in specific terms that the property was acquired by means of the false pretenses, when it alleges that by representations so made the defendant obtained the property: *State v. McConkey*, 49 Iowa, 499.

An indictment setting out the words used by defendant as false pretenses is sufficient without explaining their meaning: *State v. Call*, 48 N. H. 126.

It is essential that the indictment show that the false pretense related to a past event, or a fact having a present existence, and not to something to happen in the future, whether in the nature of a promise or not: *Scarlett v. State*, 25 Fla. 717; *State v. Evers*, 49 Mo. 542; *Dillingham v. State*, 5 Ohio St. 280; *Johnson v. State*, 41 Tex. 65; *State v. Haines*, 23 S. C. 170; *People v. Blumhard*, 90 N. Y. 314. But an indictment alleging several matters as false pretenses, some of which have a present existence, is not bad for the reason that one of the pretenses alleged relates to something to be done in the future: *State v. Vorback*, 66 Mo. 168; *State v. Jansan*, 80 Mo. 97.

It is essential to the validity of the indictment that it should contain a distinct and specific averment that the pretenses charged, or some of them, are false in fact: *State v. Pickett*, 78 N. C. 453; *People v. Reynolds*, 71 Mich. 343; *State v. Metsch*, 37 Kan. 222; *Hamilton v. State*, 16 Fla. 288; *Redmond v. State*, 35 Ohio St. 81; *State v. Levi*, 41 Tex. 563; *State v. Peacock*, 31 Mo. 413; *Puttee v. State*, 109 Ind. 545; *People v. Haynes*, 14 Wend. 557; 28 Am. Dec. 530; *Tyler v. State*, 2 Humph. 37; 36 Am. Dec. 298.

The indictment must charge in terms that the property was acquired by means of the false pretenses: *Epperson v. State*, 42 Tex. 79; *State v. Conner*, 110 Ind. 469; *Cowan v. State*, 22 Neb. 519; *Norris v. State*, 25 Ohio St. 217; 18 Am. Rep. 291; and that the prosecutor was induced to part with the property by his reliance upon the truth of such representations: *Jones v. State*, 50 Ind. 473; *State v. Green*, 7 Wis. 676; *Pendry v. State*, 18 Fla. 191; *Ladd v. State*, 17 Fla. 215; *State v. Jordan*, 34 La. Ann. 1219; *Cooke v. State*, 83 Ind. 402; *Commonwealth v. Goddard*, 4 Allen, 312; *People v. Cline*, 44 Mich. 290. An allegation, however, that the party defrauded was induced by the false representations to part with his property necessarily implies that he

relied upon them, without an allegation to that effect in express words: *Norris v. State*, 25 Ohio St. 217; 18 Am. Rep. 291; *State v. Penley*, 27 Conn. 587; *People v. Jacobs*, 35 Mich. 36.

The property or money obtained by means of false pretenses must be described in the indictment with the same particularity and certainty as in an indictment for larceny: *Treadway v. State*, 37 Ark. 443; *Jamison v. State*, 37 Ark. 445; *State v. Reese*, 83 N. C. 637. Thus a description of the property as "a certain lot of dry goods" is insufficient: *Redmond v. State*, 35 Ohio St. 81. The property must be described with at least such certainty as to enable the jury to decide whether or not the property obtained is the same as that upon which the indictment is based: *State v. Kube*, 20 Wis. 217; 91 Am. Dec. 390. The fact that the indictment does not specifically describe all the property obtained by the false pretenses does not invalidate it: *People v. Parish*, 4 Denio, 153.

When the punishment does not depend on the value of the property obtained, no allegation as to value is required: *State v. Gillespie*, 80 N. C. 396; *Oliver v. State*, 37 Ala. 134; otherwise when the punishment depends on the value of the property obtained: *State v. Ladd*, 32 N. H. 110. It is essential to the sufficiency of the indictment that it clearly and directly allege the ownership of the money or property fraudulently acquired by the defendant. In other words, it must distinctly name the party injured by the false pretenses; an omission of this averment is fatal to the indictment: *Mays v. State*, 28 Tex. App. 434; *Burd v. State*, 39 Tex. 509; *State v. Blizzard*, 70 Md. 385; 14 Am. St. Rep. 366; *Jones v. State*, 22 Fla. 532; *Washington v. State*, 41 Tex. 583; *Halley v. State*, 43 Ind. 509; *Leobold v. State*, 33 Ind. 484; *Thompson v. People*, 24 Ill. 60; 76 Am. Dec. 733. And when the name of the party defrauded is unknown, the indictment must be drawn according to the rules of the common law. The trick and deception or false representation must be particularly set forth, and that the name of the defrauded party is not known should be alleged as a reason for not setting it forth: *State v. McChesney*, 90 Mo. 120; overruling the same case in 16 Mo. App. 259; *State v. Horn*, 93 Mo. 190.

When the property or money is obtained from an agent or from a partnership, the ownership is properly alleged to be in the principal or in the firm name, respectively: *Commonwealth v. Call*, 21 Pick. 515; *State v. Williams*, 103 Ind. 235.

The indictment must show that the possession of the money or property was delivered to defendant by the defrauded party. Hence it is always necessary to allege that the possession of the property was obtained by defendant by means of the false pretenses alleged: *State v. Conner*, 110 Ind. 469; *Johnson v. State*, 11 Ind. 481; *State v. Orvis*, 13 Ind. 569; *State v. Williams*, 103 Ind. 235; *Wagoner v. State*, 90 Ind. 504; *State v. Saunders*, 63 Mo. 482; *State v. McGinnis*, 71 Iowa, 685; *State v. Clark*, 72 Iowa, 30. In charging the crime, the words "false representations" and "false pretenses" have the same meaning: *State v. Joaquin*, 43 Iowa, 131.

Jurisdiction — Venue. — To constitute the crime of obtaining money or property by false pretenses, there must be an acquisition of the property by means thereof, and the title must pass from the injured party to the accused. Hence the offense must be prosecuted in the county or state in which the property was acquired, no matter in what county or state the false pretenses or fraudulent representations were made: *Sims v. State*, 28 Tex. App. 447; *Adams v. People*, 1 N. Y. 173; *State v. Shueffer*, 89 Mo. 271; *State v. House*, 55 Iowa, 466; *Stewart v. Jessup*, 51 Ind. 413; 19 Am.

Rep. 739; *Commonwealth v. Van Tuyl*, 1 Met. (Ky.) 1; 71 Am. Dec. 455; deciding that where the fraud is concocted and the false representations are made in one state, but the scheme is completed and the property or money is acquired in another, the crime is committed in the latter state, and the perpetrator is properly prosecuted there. So where one, by false pretenses sent by mail, procures the owner of goods to deliver them to a designated common carrier in one county, consigned to the defendant in another county, the offense is complete in the former county, and must be prosecuted there: *Norris v. State*, 25 Ohio St. 217; 18 Am. Rep. 291. If, by means of false pretenses, the injured party is induced to transmit by mail to the accused a draft or other writing, the postmaster is the agent of the latter to forward the letter to him, and the crime is complete at the place where the letter is mailed: *Commonwealth v. Wood*, 142 Mass. 459.

Evidence — Other False Pretenses. — In prosecutions for obtaining money or property by false pretenses, evidence of similar pretenses, made about the time, and either before or after the pretenses alleged, to others, or the same person, in the same locality, is admissible to show guilty knowledge or intent, which must always be proved: *People v. Wakely*, 62 Mich. 298; *State v. Jamison*, 74 Iowa, 613; *People v. Henssler*, 48 Mich. 49; *State v. Myers*, 82 Mo. 558; 52 Am. Rep. 389; *State v. Bayne*, 88 Mo. 604; *Mayer v. People*, 80 N. Y. 364; *State v. Long*, 103 Ind. 481; *State v. Sarony*, 95 Mo. 349; *Cowan v. State*, 22 Neb. 520; *Trogdon v. Commonwealth*, 31 Gratt. 862; *Commonwealth v. Blood*, 141 Mass. 571; *Thompson v. Rose*, 16 Conn. 71; *Commonwealth v. Stone*, 4 Met. 43; *Strong v. State*, 86 Ind. 208; 44 Am. Rep. 292. Thus under an allegation of falsely pretending that a forged certificate of stock was genuine, evidence of the possession and use of other forged certificates of stock by the defendant, at about the same time, whether before or afterwards, is admissible on the question of guilty knowledge and intent: *Commonwealth v. Coe*, 115 Mass. 481. So evidence to show that defendant had drawn other drafts of the same nature as the one charged on the same firm, with which he falsely pretended to have credit, and that such drafts had not been paid, is admissible to show that he had no credit with such firm, and therefore knew that his draft on such firm would not be paid: *People v. Waserovogle*, 77 Cal. 173. So evidence tending to show that defendant, by his long continuance in the business of handling and selling horses, knew that the horse sold was not of the character or in the condition represented by him is competent: *Jackson v. People*, 126 Ill. 139. On the trial of one charged with obtaining money by false pretenses on a railway train, evidence to show the system on which similar operations had been conducted by defendant and his accomplices for some days previous and up to the time when the crime charged was committed is admissible to show the intent with which defendant remained on the train with his victim after obtaining his money: *State v. Beaucleigh*, 92 Mo. 490.

Evidence — Guilty Intent. — The judgment roll in a prior action against defendant, in which the invalidity of his title was adjudged, is competent, in connection with the evidence of the prosecuting attorney, upon defendant's trial for obtaining money by false pretenses, by deed of such title, to show his guilty knowledge that he was selling property to which he had no title: *People v. Hamburg*, 84 Cal. 468. To show the defendant's guilty intent, evidence of the steps preliminary to the commission of the crime is admissible: *People v. Winslow*, 39 Mich. 505; *State v. Montgomery*, 56 Iowa, 195. Evidence of similar transactions will not be admitted, if so remote that no connection exists between them and the transaction charged; and what limit of time will make such

transactions thus remote is for the court to determine, upon the facts of the case: *Troglon v. Commonwealth*, 31 Gratt. 862; *Mayer v. People*, 80 N. Y. 364. And false statements made by the accused, with regard to the transaction charged, six months after it occurred, are not admissible to show his fraudulent intent at the time the crime was committed: *State v. Church*, 43 Conn. 471; *Todd v. State*, 31 Ind. 514. Evidence that defendant was deeply insolvent at the time of making the false representations as to solvency relied upon is competent to show his guilty intent: *Commonwealth v. Jeffries*, 7 Allen, 548; 83 Am. Dec. 712. Schedules of his assets and liabilities, made by him in proceedings in bankruptcy, are admissible for this purpose: *Abbott v. People*, 75 N. Y. 602; *Commonwealth v. Drew*, 153 Mass. 588. So, for the purpose of proving his insolvency and intent, evidence that, three days after obtaining goods by false pretenses of his ability to pay his debts, the defendant, who had given his note for the purchase-money, mortgaged all his property to another is admissible: *State v. Call*, 48 N. H. 126. On the trial of one accused of obtaining goods by falsely representing to a merchant that he was not trading with any one, and was only indebted to him and one other, it is competent to introduce the itemized account of defendant's indebtedness at the time the goods were obtained to one not mentioned in his representations as a creditor, as evidence to show that the representations made were false, and made with a fraudulent intent: *Smith v. State*, 55 Miss. 514. Proof of the insolvency of the defendant is not admissible, unless the indictment avers negatively the defendant's representations of his solvency: *State v. Long*, 103 Ind. 481. Where one is charged with having falsely represented that the bill of an insolvent bank was worth its nominal value, and having passed it at that value knowing it to be worthless, evidence that it was not worth its nominal value is admissible, as tending to prove the fraudulent intent in passing it: *Commonwealth v. Stone*, 4 Met. 43. The disposition made of the goods by the defendant is admissible to show his intent in obtaining them: *State v. Lichtler*, 95 Mo. 402. Declarations and admissions made by defendant, and relating to the transaction charged, are admissible against him for the purpose of establishing his guilt: *State v. Long*, 103 Ind. 481; *Commonwealth v. Castles*, 9 Gray, 121; 69 Am. Dec. 278; *State v. Wilkerson*, 72 N. C. 376. Thus where defendant, when arraigned upon an indictment for obtaining money upon false pretenses that he was a man of means, obtained counsel at the expense of the state by pleading his poverty to the court, his statement thus made is admissible to prove the falsity of the pretense made to his victim: *State v. Fooks*, 65 Iowa, 196. So the conversations of his co-conspirator relating to the same crime, not made in his presence, are admissible against him: *State v. Montgomery*, 56 Iowa, 195. Such evidence, however, is not sufficient to convict, unless corroborated: *State v. Penny*, 70 Iowa, 190. It has been decided that where the false pretenses consist of a writing, as an order for the payment of money, the production of the writing is not required, and parol evidence of its contents is admissible to show defendant's guilt: *State v. Wilkerson*, 72 N. C. 376. But the better rule seems to be, that before such evidence is admissible, the loss or destruction of the writing must be shown, or its non-production accounted for: *State v. Penny*, 70 Iowa, 190. Of course, any writing used by the defendant for the purpose of perpetrating the fraud, and obtaining the property, or having any connection with it in any way, is admissible in evidence against him, even though it may not in terms apply to the indictment, so long as it tends to prove the falsity of the pretenses alleged, or to establish defendant's guilt in any way: *Commonwealth v. Blood*, 141 Mass. 571; *Cowan*

v. *State*, 22 Neb. 519; *Abbott v. People*, 75 N. Y. 602; *Smith v. State*, 55 Miss. 513. After such writing has been introduced, however, the defendant may introduce parol evidence in relation to it to disprove his fraudulent intent as shown by it: *People v. Getchell*, 6 Mich. 496; *State v. Garriss*, 98 N. C. 733. And when the transactions charged are of a complicated nature, the defendant may show the course of dealing between himself and the prosecutor, both before and after the alleged crime, as showing defendant's intent, or that the prosecutor was not in fact deceived, or that he was using the criminal law to enforce the collection of a debt: *State v. Rivers*, 58 Iowa, 103. But his books of account, without other evidence of their truthfulness, are not admissible in his behalf to show the state of the account of one whose signature he is charged to have obtained by false pretenses, to a note for more than was due: *People v. Genung*, 11 Wend. 18; 25 Am. Dec. 594. Evidence by defendant of an offer to refund the money obtained is not admissible in his defense: *Carlisle v. State*, 77 Ala. 71. Where two are jointly indicted for obtaining goods by false pretenses, evidence tending to prove the crime against one of them, but not against the other, is admissible: *Commonwealth v. Blood*, 141 Mass. 571.

Evidence — Burden of Proof. — In a prosecution for obtaining money or property by false pretenses, the burden of proof, in order to convict, is upon the state to prove the intent to defraud, the false pretenses made with such intent, and that the person who parted with the property relied upon such pretenses, and that the property was thereby obtained: *State v. Clark*, 46 Kan. 65; *State v. Matthews*, 44 Kan. 596; *State v. Metsch*, 37 Kan. 222; *State v. Willbourne*, 87 N. C. 529; *State v. Rivers*, 58 Iowa, 103; *People v. Wakely*, 62 Mich. 297. It must always be proved that the prosecutor intended to part with the title to the property, and not merely with the possession: *State v. Anderson*, 47 Iowa, 142; and that the property was obtained by reason of the false pretenses as a material inducement. This need not be established by direct evidence, but may be inferred from the facts: *Therasson v. People*, 82 N. Y. 238.

Evidence, Sufficiency of. — The evidence need not show that the pretenses employed were the sole inducement to part with the title to the property, if it shows that they exerted a controlling influence: *People v. Herrick*, 13 Wend. 87. Nor in such case is it necessary to show that the pretenses were made directly to the defrauded party: *Roberts v. People*, 9 Col. 458. Where two are jointly indicted, evidence that one of them, with the knowledge, concurrence, and direction of the other, made the false pretenses charged, will warrant the conviction of both: *Commonwealth v. Harley*, 7 Met. 462. An indictment charging that defendant represented himself to be a person of a certain name, when making the false pretenses, is sustained by evidence that the defrauded party was thereby induced to believe that to be his name: *State v. Goble*, 60 Iowa, 447. The admission by defendant of the falsity of the pretenses, unless corroborated, is not sufficient to convict: *State v. Penny*, 70 Iowa, 190. An allegation that the prosecutor was induced to part with his goods as upon a sale upon credit by means of the false pretenses is sufficiently proved by evidence of a sale of the goods to the defendant by reason of the pretenses, on his promissory note payable in four months: *Commonwealth v. Davidson*, 1 Cush. 33. Where it is alleged that the money or property was obtained by means of several false pretenses, evidence that the prosecutor was induced to part with the property by relying upon any one of the pretenses will support a conviction. In other words, proof of any one of the false pretenses alleged will support the indict-

ment: *People v. Wakely*, 62 Mich. 297; *State v. Dunlap*, 24 Me. 77; *State v. Mills*, 17 Me. 211; *Beasley v. State*, 59 Ala. 20; *People v. Blanchard*, 90 N. Y. 314; *Cowen v. People*, 14 Ill. 348; *State v. Vorback*, 66 Mo. 168; *Commonwealth v. Morrill*, 8 Cush. 571.

Variances. — *The Evidence must Follow the Allegations*, but if the pretense charged is proved in substance, and is one which naturally would, and in fact did, lead the prosecutor to part with his property, it need not be proved in the exact words alleged, but the idea conveyed by the defendant and that alleged must be identified by the proof: *State v. Vanderbilt*, 27 N. J. L. 328. Thus if it is alleged that the accused, by means of false pretenses, obtained money, evidence that he gave a note therefor as an inducement will not constitute a variance, although the indictment contains no allegation in regard to the note: *Commonwealth v. Coe*, 115 Mass. 481. An indictment for obtaining money or goods by false pretenses is not sustained by proof of an unaccomplished attempt to thus obtain it: *State v. Corbett*, 1 Jones, 264. And where two persons are charged with jointly obtaining money by false pretenses, evidence of a loan to one of them will not support the allegation; the variance is fatal: *Commonwealth v. Pierce*, 130 Mass. 31. Any variance between the proof and the allegations, as to the money obtained or as to the nature of the property, is fatal. Thus if there is such variance as to the amount obtained: *Litman v. State*, 9 Tex. App. 461; *Marwinsky v. State*, 9 Tex. App. 377; *contra*, *Moore v. State*, 20 Tex. App. 33; or as to the currency in which it is alleged the amount obtained was paid: *Fay v. Commonwealth*, 28 Gratt. 912. So if the indictment alleges that the defendant falsely pretended to have a certain sum of money, while the proof shows that he so pretended to have a different sum: *O'Connor v. State*, 30 Ala. 9; or to owe a different amount from that alleged: *Commonwealth v. Davidson*, 1 Cush. 33, — the variance is fatal. An allegation of obtaining money by false pretenses is not supported by proof of obtaining a certificate of deposit on a bank: *Commonwealth v. Howe*, 132 Mass. 250; and an allegation of so obtaining a package of money in bank bills is not sustained by proof of obtaining it in gold or silver coin: *State v. Kube*, 20 Wis. 217; 91 Am. Dec. 390. So an allegation of so obtaining money is not sustained by proof of so obtaining the indorsement of a forged note which was sold for money: *Baker v. State*, 31 Ohio St. 314. Where a draft is alleged to be the false representation upon which the money was obtained, and the proof shows that, instead of being a draft, the paper consisted of an order payable only in goods of a certain kind at a certain place, the variance is fatal: *Prehm v. State*, 22 Neb. 673. So where an order from a certain person in New York to purchase goods is set out as the false pretenses, the allegation is not sustained by proof of a false pretense as to having an order to purchase the goods, without showing that it was from a certain person in New York: *Commonwealth v. Jeffries*, 7 Allen, 548; 83 Am. Dec. 712. An allegation that a note obtained by false pretenses was executed by the party defrauded is not sustained by proof that it was jointly executed by him and another: *People v. Reed*, 70 Cal. 529. An allegation that money was obtained by falsely personating another must be proved as laid, and evidence that two were acting in concert, and one of them personated the assumed party with the assent and concurrence of the other, will not sustain a false personation by the latter: *Kirtley v. State*, 38 Ark. 543. A charge of false pretenses to a county is sustained by proof of such pretenses to its officers: *Roberts v. People*, 9 Col. 458. An averment that defendant falsely pretended to have an order from a certain person to purchase goods at a designated price is

sustained by proof that he fraudulently pretended to have an order from that person to purchase the goods, and bargained for them on his own behalf at the price named. Nor is there any variance between a further averment, that the vendor, by reason of such pretenses, was induced to thus sell and deliver the goods, and proof that his inducement was the expectation of receiving the price from the party represented as giving such order: *Commonwealth v. Jeffries*, 7 Allen, 548; 83 Am. Dec. 712.

If there is a variance between the christian name of the party defrauded, or of the defendant, as alleged and proved, it is fatal: *State v. Horn*, 93 Mo. 190. But where the prosecutor is named in the indictment by the initials of his name alone, while the proof shows his full christian name, and that he is the party charged, there is no variance: *Franklin v. State*, 52 Ala. 415.

Distinguished from Other Crimes.—The crime of obtaining money or goods by false pretenses, and the crime of larceny, are distinguishable from one another in this: that if by means of the false pretenses the owner of the property is induced to part with the possession only, still intending to retain the right of property, the taking by such means, if done with a felonious intent to deprive the owner of his property and to convert it to the use of the taker, is larceny; but if the owner, by means of such pretenses, parts not only with the possession, but also with the right of property, the crime of the party is obtaining the property by false pretenses, and not larceny.

To constitute the offense of obtaining money or goods by false pretenses, the title as well as the possession of the property must be obtained by the accused, and must pass from the defrauded party. When the possession only is obtained, without an intent on the part of the owner to part with the title to the property, but with a felonious intent on the part of the taker to convert it to his own use, the crime committed is larceny: *State v. Vickery*, 19 Tex. 326; *Cline v. State*, 43 Tex. 494; *Commonwealth v. Eichelberger*, 119 Pa. St. 254; 4 Am. St. Rep. 642; *State v. Hall*, 76 Iowa, 85; 14 Am. St. Rep. 204; *March v. State*, 117 Ind. 547; *Miller v. Commonwealth*, 78 Ky. 15; *Ross v. People*, 5 Hill, 294; *Smith v. People*, 53 N. Y. 111; 13 Am. Rep. 474; *People v. Rae*, 66 Cal. 423; 56 Am. Rep. 102; *Zink v. People*, 77 N. Y. 114; 33 Am. Rep. 589; *State v. Kube*, 20 Wis. 217; 91 Am. Dec. 390.

The distinction between the crime of obtaining money or property by false pretenses, and the crime of embezzlement, is the same as that between the former and larceny: *Commonwealth v. Barry*, 124 Mass. 325.

The distinction between obtaining property by false pretenses and forgery is, that where a false and fictitious document is used which was executed by a third person, and the person so using it represents it to be executed by himself, he is guilty of false pretenses; but if he represents the document as that of the real maker, he is guilty of uttering a forged instrument: *Mann v. People*, 15 Hun, 155.

Paying or exchanging counterfeit money for goods is not obtaining money or goods by false pretenses, but is the higher crime of passing counterfeit money: *Cheek v. State*, 1 Cold. 172; *State v. Allred*, 84 N. C. 749. But, in order to constitute the latter crime, the money passed must be a representation of genuine coin on both sides; and if it is a piece of spurious metal about the size of a current coin, representing it on one side, but an advertisement on the other, and not in itself purporting to be coin, passing it as a coin is a false pretense, if the other requisites to the crime exist: *Roberts v. State*, 2 Head, 501.

Instructions.—On the trial of one accused of obtaining money or property by false pretenses, the jury should be instructed that it is necessary for the

state to prove the substance of the charge as laid: *State v. Rivers*, 58 Iowa, 102; and that although the pretense need not be proved in the exact words charged, still that the idea conveyed by the defendant and that alleged must be identified by the proof: *State v. Vanderbilt*, 27 N. J. L. 328; and that, to convict, the jury must believe, beyond a reasonable doubt, that the accused obtained the money of the prosecutor with intent to cheat and defraud him by inducing him to believe and rely upon the false representations made, and that all the facts in evidence bearing on the question of intent must be taken into consideration: *State v. Sarony*, 95 Mo. 349.

ADAMS v. STOREY.

[135 ILLINOIS, 443.]

DOWER AS CONTINUING RIGHT. — The right of a wife to be endowed of a third part of all the lands whereof her deceased husband was seised of an estate of inheritance, at any time during the marriage, continues after divorce, unless she voluntarily relinquishes it, or it is barred for one of the causes prescribed by the statute, or she is, by some rule of law or equity, precluded or estopped from asserting it.

DOWER IS THE PROVISION WHICH IS MADE BY LAW for the wife out of the lands and tenements of her husband for her support and maintenance after his death, but the wife cannot have both dower and that which is given in lieu of dower out of the same property.

ALIMONY IS AN ALLOWANCE MADE TO A WOMAN on a decree of divorce for her support out of the estate of her husband, and under exceptional circumstances it may be decreed, once for all, of a sum in gross, or of real estate absolutely, to the wife, and at all events alimony terminates with the life of the husband.

DOWER, ALIMONY AS A BAR TO. — Where, upon a decree of divorce in favor of a wife, entered by consent, she is given an annuity for life, secured by a lien on certain real estate, and also by the husband's mortgage on the same, the annuity so decreed will be presumed to have been in lieu of dower, and if she receives such annuity during the husband's life and after his death, she will be estopped from claiming dower in the real estate securing her annuity.

WRIT of error to reverse a decree assigning dower in certain real estate. The opinion states the facts.

Weigley, Bulkley, and Gray, for the plaintiffs in error.

Gregory, Booth, and Harlan, for the defendant in error.

BAKER, J. The matter of the decree of February 17, 1868, allowing to Maria P. Storey, the defendant in error herein, for her alimony and maintenance, the sum of two thousand dollars per annum, "for so long as she may be and remain sole and unmarried," was before this court at a former term, and it was held that the annual allowance of two thousand dollars, to be paid according to the provisions of that decree, did not

terminate with the life of the husband, but was binding upon his estate after his death, and should be continued to her so long as she lives and remains sole and unmarried: *Storey v. Storey*, 125 Ill. 608; 8 Am. St. Rep. 417. In the present proceeding for the assignment to her of dower in the same land and premises upon which said annuity was made a lien and charge, various points are made by plaintiffs in error, such as the sufficiency of the proof to establish the death of Wilbur F. Storey; the competency of the evidence which was introduced to show the seisin by him, during the coverture, of the premises in which dower is claimed; the rendering of a decree against plaintiffs in error, jointly, for damages for detention of dower; and the entering of any decree whatever against Hansen, one of the plaintiffs in error, for damages for the non-assignment of dower, which are merely ancillary to the paramount question at issue, and which, in the view which we take of that question, we may forbear considering.

In this state, the right of a wife to be endowed of a third part of all the lands whereof her deceased husband was seised of an estate of inheritance, at any time during the marriage, is a statutory as well as a common-law right. Being a clear statutory and legal right, it continues, unless she voluntarily relinquishes it, or it is barred for one of the causes prescribed by the statute, or she is, by some rule of law or equity, precluded or estopped from asserting it. In *Gilbert v. Reynoldz*, 51 Ill. 513, it was held that a widow may, by her laches, estop herself from claiming dower. In *Collins v. Woods*, 63 Ill. 285, and *Allen v. Allen*, 112 Ill. 323, it was held that acts and conduct sufficient to constitute an equitable estoppel would bar the right. In *Hoppin v. Hoppin*, 96 Ill. 265, it was held that her covenant of warranty against all encumbrances would operate to prevent her from afterwards setting up a claim to dower. In *Torrey v. Minor*, 1 Smedes & M. Ch. 489, it was held that a covenant of the ancestor of the widow barred her claim to dower. And in *Skinner v. Newberry*, 51 Ill. 203, where moneys were due the testator, at his decease, upon executory contracts for the sale and conveyance of real estate, it was said that the widow, "by claiming her share of the purchase-money, cuts off her rights of dower in the lands sold."

The divorce of 1868 was granted for the fault and misconduct of the husband, and it was expressly found by the decree that defendant in error was without fault in the premises.

So, as matter of course, under our statute (Dower Act, sec. 14), the mere entry of the decree for a divorce had no effect to deprive her of her inchoate right of dower. But the decree for divorce was followed by a further decree, wherein it was adjudged and decreed that the defendant in the divorce suit pay, or cause to be paid, to and for the use of defendant in error, for so long as she may be and remain sole and unmarried, the sum of two thousand dollars per annum, payable in quarterly installments of five hundred dollars each, and further ordered and decreed that the sums of money so allowed her, and for her use, should be a lien and a charge upon the premises which are described in the decree, and in which she is now seeking to get dower.

Dower is the provision which the law makes for a wife out of the lands and tenements of her husband for her support and maintenance after his death. Alimony is that allowance which is made to a woman, on a decree of divorce, for her support out of the estate of her husband. It is the equivalent of the obligation implied in every marriage contract, that the husband shall furnish his wife a suitable support and maintenance: *Stillman v. Stillman*, 99 Ill. 196. By the English law, alimony was but an allowance during the joint lives of the husband and wife, and it could not be ordered for the term of the wife's life, because it is a maintenance to her, while the husband's duty to maintain her ceases at his death: See *Lennahan v. O'Keefe*, 107 Ill. 620, and authorities there cited. It was said in that case, that under our statute the power of the court to allow alimony is broader than it was in England, and also said that the court may, under exceptional circumstances, make an allowance for alimony, once for all, of a sum in gross, or may decree real estate absolutely to the complainant. But no allowance of the character of either of those above indicated was made in the decree of 1868, and the provision therein made for the alimony, maintenance, and use of the divorced wife was an annuity of two thousand dollars for so long as she may be and remain sole and unmarried, and such annuity was amply secured by making it a lien and a charge upon real estate. The annuity in question is an annuity for life, since it can be determined only by the voluntary act of the annuitant: 4 Coke, 3 a; *Hamilton v. Buckwalter*, 2 Yeates, 389; 1 Am. Dec. 350.

At the time that the decree was entered for two thousand dollars per annum, defendant in error had two rights, and

two only, as against the defendant in the divorce suit or his property. One was against him personally, for support and maintenance during their joint lives, and which, if she did not sooner decease, would necessarily terminate with his life; and the other was an inchoate right, to become consummate at his death, to be endowed of the third part of all the lands whereof he had been seised of an estate of inheritance during the coverture. At the same time, the only legal duty which was imposed upon said defendant was one which was correlative to the first of the above-mentioned rights, and was the duty to support and maintain her during the joint lives of both. There was no legal duty incumbent upon him that was responsive to the other of said rights of defendant in error, but in place thereof the law itself both gave to her such right, and secured the same to her, but out of his estate, not to take effect, however, until after his decease.

The decree which was entered by the court was responsive to both of these rights of defendant in error, and gave to her the full measure of all that she could lawfully or justly or equitably claim in satisfaction of either and both of the rights with which she was invested. The decree did not in express terms provide that dower should be barred, but such was its evident intention, and the provisions of the bond, trust deed, and other instruments in evidence indicate that it was so understood by both of the parties to the suit and by the court. It was, as appears upon its face, a consent decree, and it ordered and adjudged that the defendant "pay, or cause to be paid, to and for the use of the said complainant, for so long as she may be and remain sole and unmarried, the sum of two thousand dollars per annum," etc., and further ordered and decreed "that said sums of money shall be, and they are hereby declared to be, a lien and a charge upon the following premises and lands," etc. The moneys are decreed to be paid "to and for the use of the complainant," and the annuity is extended during the term of her life, and is made a lien and a charge upon the real estate of the defendant, thereby giving her a life estate therein. As matter of fact, the allowance made not only furnished her with alimony proper, but with a full and liberal equivalent for dower. The installments of the annuity that have accrued since the death of the husband, and those that may hereafter become due, were and are based upon no right vested in defendant in error or duty incumbent upon her divorced husband, unless they

were and are predicated upon her right of dower. It must not be presumed, under the circumstances of the case, that the allowance of two thousand dollars a year for the time intervening the death of said husband and her own death was in lieu of dower. The decree for support and maintenance was a consent decree, and, as such, to be regarded as a contract between the parties to the suit. Defendant in error having taken support and maintenance, and still continuing to claim and take support and maintenance under the contract, and which was and is a charge upon the real estate here in question, she is estopped from also claiming dower in the same land. The contract and her conduct amount to a waiver of dower.

It is a well-settled principle, acknowledged at law as well as in equity, that a wife cannot have both dower and what is given in lieu of dower: *Birmingham v. Kirwan*, 2 Schoales & L. 444; *Parham v. Parham*, 6 Humph. 287; *Warfield v. Castleman*, 5 T. B. Mon. 517. In *Lennahan v. O'Keefe*, 107 Ill. 620, this court said that "it would require an extraordinary case to justify the postponement of creditors and heirs to the payment of both dower and alimony, currently, during the life of the divorced wife, and that in very many cases such an order would be equivalent to an entire appropriation of the husband's estate."

The decree is reversed and the cause remanded, with directions to dismiss the petition, at the costs of the petitioner.

DOWER — EFFECT OF DIVORCE ON. — A wife's right of dower which is vested in her prior to divorce is not divested thereby, unless the statute has expressly so declared: *Van Cleaf v. Burns*, 118 N. Y. 549; 16 Am. St. Rep. 782, and note; *Orth v. Orth*, 69 Mich. 158; *Bowles v. Hoad*, 71 Mich. 150. A wife's right of dower in her deceased husband's estate does not depend upon the existence of the family relation at his death: *Nye's Appeal*, 126 Pa. St. 341; 12 Am. St. Rep. 873, and note.

A wife is not entitled to dower after the death of her husband, where a decree of divorce in his favor is enforced: *McCraney v. McCraney*, 5 Iowa, 232; 68 Am. Dec. 702, and note. A divorce bars all claim of the wife to dower: *McKean v. Brown*, 83 Ky. 208.

MARRIAGE AND DIVORCE — ALIMONY — WHAT IS, AND WHEN TERMINATES. — Alimony is the provision or allowance made for the support of a wife upon divorce: *Parsons v. Parsons*, 9 N. H. 309; 32 Am. Dec. 362. See extended note to *Buckminster v. Buckminster*, 88 Am. Dec. 657, and also extended note to *Methvin v. Methvin*, 60 Am. Dec. 664. The right to alimony ceases on the death of the husband: *Gaines v. Gaines*, 9 B. Mon. 295; 48 Am. Dec. 425, and note; *Lockridge v. Lockridge*, 3 Dana, 28; 28 Am. Dec. 52. See *Storey v. Storey*, 125 Ill. 608; 8 Am. St. Rep. 417, and note.

ALIMONY AS A BAR TO DOWER. — A decree of divorce in favor of a wife, with a provision for permanent alimony, bars dower: *Tatro v. Tatro*, 18 Neb. 395; 53 Am. Rep. 821. A decree of divorce granting a gross sum to the wife, and discharging the husband from all further liability for her support, does not bar dower: *Taylor v. Taylor*, 93 N. C. 418; 53 Am. Rep. 460.

WILLIAMS v. CHICAGO AND ALTON R. R. Co.

[135 ILLINOIS, 491.]

NEGLIGENCE MUST BE RESPECTING A DUTY TO PLAINTIFF. — To justify recovery for alleged negligence, it is not sufficient to show that defendant has neglected some duty or obligation existing at common law or imposed by statute. He must be shown to have neglected a duty or obligation which he owed to him who claims damages for the neglect.

RAILROADS — FAILURE TO SIGNAL AT CROSSINGS — WHO MAY RECOVER. — A statute requiring railroad companies to ring the bell or sound the whistle eighty rods before crossing a public highway is for the benefit of travelers upon the highway, either at the crossing, or before reaching or after crossing it, or traveling parallel with the track, and not for the benefit of farmers and their horses at work in adjoining fields. As to the latter, such statute imposes no duty on the company, and they cannot recover for its negligence in failing to give the required signals.

Thomas F. Tipton, for the plaintiff in error.

Williams and Capen, for the defendant in error.

MAGRUDER, J. This is an action brought in the circuit court of McLean County by the plaintiff in error, against the defendant in error, to recover damages for a personal injury. The declaration avers that the railroad track of the defendant below crosses a public highway adjoining the farm of one Johnson; that within eighty rods of the crossing there is a curve in the track, and there are timber and other growth on the right of way, by reason of which persons plowing on the farm near the right of way are unable to see a train coming until it is within two hundred yards of the crossing; that on April 12, 1889, plaintiff below was plowing on said farm within thirty feet of said right of way, and at a point where the engine and train left the curve, and came within view of said crossing; that, in order to give notice to parties working on said land and near the right of way of the approach of a train, it is the duty of the defendant to ring a bell or blow a whistle at least eighty rods before reaching said crossing, and to keep the bell ringing or whistle blowing until the crossing is reached, that persons plowing may stop and hold their horses; that the defendant wholly failed in its duty in this

regard; that the plaintiff, while at work in said field, and in the exercise of due care, could not see the approaching train, by reason of the curve, timber, and undergrowth, and in consequence of such negligence of the defendant, the team used by the plaintiff became scared, and whirled around, and one of the horses struck the plaintiff, and broke his right thigh, etc. A demurrer was filed to the declaration, which was general, and also set up special causes. The circuit court sustained the demurrer, and entered judgment for the defendant. The appellate court has affirmed the judgment of the circuit court.

Inasmuch as the demurrer admits the allegations of the declaration to be true, it is conceded that the defendant was guilty of negligence in not ringing the bell or blowing the whistle at a distance of eighty rods from the crossing. Section 68 of the Railroad Act (Starr and Curtis's Ann. Stats., c. 114, p. 1935) provides that "every railroad corporation shall cause a bell of at least thirty pounds weight and a steam-whistle [to be] placed and kept on each locomotive-engine, and shall cause the same to be rung or whistled by the engineer or fireman at the distance of at least eighty rods from the place where the railroad crosses or intersects any public highway, and shall be kept ringing or whistling until such highway is reached." The first section of the act of February 27, 1869, from which the foregoing provision has been taken after being rewritten and changed, contained the following language, to wit: "And the corporation owning the railroad shall be liable to any party injured for all damages sustained by reason of such neglect": Pub. Laws 1869, p. 308. The same language was contained in section 38 of the act of November 5, 1849: Gen. Laws 1849, pp. 31, 32; but in the revision of 1874 it was omitted, and it is not now a part of the Railroad Act.

The question presented for our consideration is, whether or not the plaintiff has a right of action based upon the negligence of the company in not ringing the bell or blowing the whistle. In other words, did the company owe it as a duty to the plaintiff to comply with the statutory requirement above specified? In order to justify a recovery, it is not sufficient to show that the defendant has neglected some duty or obligation existing at common law or imposed by statute, but that the defendant has neglected a duty or obligation which it owes to him who claims damages for the neglect: *O'Donnell v. Providence etc. R. R. Co.*, 6 R. I. 211. It has been said: "However great the defendant's negligence, if it was commit-

ted without violating any duty which he owed, either directly to the plaintiff or to the public in a matter whereof he had the right to avail himself, . . . there is nothing which the law will redress": Bishop on Non-contract Law, sec. 446. In Shearman and Redfield on Negligence, 4th ed., sec. 8, the doctrine is thus expressed: "If the defendant owes a duty, but does not owe it to the plaintiff, the action will not lie."

It is a fair construction of section 68 as above quoted that the duty there imposed upon railroad companies was intended to be for the benefit of travelers upon the public highways. If it were not so, why is the bell required to be rung or the whistle to be sounded at a certain distance from "the place where the railroad crosses or intersects a public highway"? The place here indicated is the intersection of a railroad with a public highway, and the persons whose safety and protection are contemplated by this phraseology are those who use the highway and those who are passengers upon the passing train.

Similar provisions exist in the statutes of other states, and the uniform current of authority is in favor of the construction that the requirement is for the benefit of travelers upon the highway. In some of the cases the obligation to ring the bell or blow the whistle exists where the grade of the railroad track and that of the highway are on the same level; in others, where the track is upon a bridge raised above and over the highway. In some of the cases it is held that the duty of giving the signal is exacted in order to protect travelers from actual collision with passing trains; in others, in order, also, to enable them to secure their horses against taking fright at the trains when they pass. In one case, the railroad company was held liable to one who had passed the crossing, in another case to one traveling upon a highway parallel with the track towards a highway crossing the track. But in all these cases the person who has the right of recovery is a person who is on the highway, either at the crossing or elsewhere. Wherever the hazard to be provided against is the danger of damage by the frightening of teams, the teams are those which are traveling upon the public highway at or near the crossing. The view here taken is sustained by the following authorities: 1 Thompson on Negligence, p. 352, sec. 15; p. 452, sec. 1, par. 3; *Harty v. Central R. R. Co.*, 42 N. Y. 468; *O'Donnell v. Providence etc. R. R. Co.*, 6 R. I. 211; *Holmes v. Central R. R. etc. Co.*, 37 Ga. 593; *Norton v. Eastern R. R. Co.*, 113 Mass. 366; *Wakefield v. Connecticut etc. R. R. Co.*, 37 Vt. 330; 86 Am.

Dec. 711; *Pennsylvania R. R. Co. v. Barnett*, 59 Pa. St. 259; 98 Am. Dec. 346; *Ransom v. Chicago etc. R'y Co.*, 62 Wis. 178; 51 Am. Rep. 718; *St. Louis etc. R'y Co. v. Puyne*, 29 Kan. 166; *Evans v. Atlantic etc. R. R. Co.*, 62 Mo. 49.

It is manifest that the plaintiff in the present case did not belong to the class for whose benefit the railroad companies are required to give the signal. Unquestionably the defendant neglected its duty, but it neglected no duty which it owed to the plaintiff, under the circumstances set up in the declaration. Plaintiff was not traveling upon the highway, either at the crossing, or before reaching the crossing, or after passing the crossing. He was not even upon a highway running parallel with the track. He was plowing on the farm, near the railroad right of way. It is true that he was within eighty rods of the highway adjoining the farm, but it cannot be said that, under section 68, above quoted, railroad companies are obliged to ring the bell or sound the whistle, in order that farmers at work in the fields may be warned of the approach of the trains, and thereby be enabled to hold their horses until the trains have passed. The statute only requires the company to give the signal when the train is eighty rods from the crossing; but if the duty imposed is for the benefit of farmers at work in the fields with their horses, then the signal will often be required before as well as after the train has reached a distance of eighty rods from the crossing. The legislature undoubtedly has the power to require a signal to be given for the benefit of farmers using their teams upon the farms along the railroad right of way, but it has not seen fit to exercise such power.

We are of the opinion that the demurrer to the declaration was properly sustained.

The judgment of the appellate court is affirmed.

RAILROADS — NEGLIGENCE. — A railroad company is not liable for injury to one to whom it owed no duty, unless such injury be willful: *Philadelphia etc. R. R. Co. Hummell*, 44 Pa. St. 375; 84 Am. Dec. 457, and note; *Toomey v. Southern Pacific R. R. Co.*, 86 Cal. 374.

RAILROADS — DUTY TO SOUND SIGNALS AT CROSSINGS. — The requirement that the engineer shall ring the bell or blow the whistle on approaching a public crossing is for the benefit only of persons who are about to cross the track: *Louisville etc. R. R. Co. v. Hall*, 87 Ala. 708; 13 Am. St. Rep. 84, and note; *Port Royal etc. R'y Co. v. Phinizy*, 83 Ga. 193. Railroad companies are liable for all damages occasioned by an omission to ring a bell or sound a whistle at or near a crossing as required: *St. Louis etc. R'y Co. v. Hendricks*, 53 Ark. 201.

MULLANPHY SAVINGS BANK v. SCHOTT.

[135 ILLINOIS, 655.]

CORPORATIONS — POWER OF OFFICER TO DEAL WITH. — A director or officer of a solvent corporation is a trustee and agent of it and of its stockholders only and so far as its creditors are concerned. He may deal with it, loan it money, and take security therefor, in like manner as a stranger. In such case the subsequent insolvency of the corporation will not affect such officer's right to recover his loan or enforce his security.

CORPORATION — MORTGAGE BY — EVIDENCE OF AUTHORITY. — Where bonds, and a deed of trust to secure their payment, are issued, executed by the president and secretary of a corporation, under its seal, this is *prima facie* evidence that they were executed by authority of the corporation.

CORPORATIONS. — RESOLUTIONS OF PRIVATE CORPORATIONS are not entitled to be recorded in the office of the recorder of deeds.

CORPORATIONS — SECONDARY EVIDENCE OF RESOLUTIONS. — Where resolutions of a private corporation sought to be introduced in evidence are shown to have been in particular hands, or if it is the natural presumption that they are in certain hands, the person into whose hands they have been traced must be produced, or it must be proved by legal evidence that they are not where they are presumed to be, before secondary evidence of their contents is admissible.

CORPORATIONS — DECLARATIONS OF OFFICER AS EVIDENCE. — Representations made by the president of a corporation while negotiating the sale of corporate bonds, that the mortgage securing them was the first lien on the corporate property, though made within the scope of his authority, are not admissible against a stockholder, not present when they were made, to affect his interest as mortgagee of the corporation under a prior mortgage, nor are such representations admissible against the assignee of such mortgagees.

AGENCY CANNOT BE SHOWN by the statements of the supposed agent.

ASSIGNMENT OF COMMERCIAL PAPER — DEFENSES. — When the assignee of commercial paper, secured by mortgage, seeks relief in equity by foreclosure of the mortgage, the mortgagor may successfully interpose any defense which would have been available against the original payee or holder of the paper. This rule, however, has reference only to equities existing in the original obligor, and not to latent equities against the assignor residing in third persons.

NOTICE — PURCHASER PENDENTE LITE IS CHARGEABLE WITH NOTICE of the allegations of a bill in equity relating to the subject-matter of the purchase.

NOTICE TO AGENT AS NOTICE TO PRINCIPAL. — Notice to an agent of any fact or facts connected with the business in which he is employed is notice to the principal.

CORPORATIONS — MORTGAGE — COVENANTS IMPLIED IN WORDS "GRANT, BARGAIN, AND SELL." — The words "grant, bargain, and sell," in a corporate mortgage securing its issue of bonds, constitute a warranty that the land conveyed and mortgaged is free of all encumbrances, and also a warranty by the corporation to the purchasers of the bonds that there is no other mortgage made by it on the property; but such covenants bind the corporation alone, and are not binding upon its individual directors and stockholders.

CORPORATION — MORTGAGE — EFFECT OF COVENANTS ARISING FROM WORDS "GRANT, BARGAIN, AND SELL."—The covenants arising from the words "grant, bargain, and sell," in a mortgage given by a corporation to secure its issue of bonds, are not fraudulent representations as to existing encumbrances, as against a prior mortgagee and director of the corporation who does not sign the mortgage containing such covenants.

CORPORATIONS — RIGHTS OF DIRECTOR AS PRIOR MORTGAGEE. — A director, who is a prior mortgagee of the corporation, by voting for the issue of bonds to pay the corporate debts and to secure the same by mortgage on the same property, and who is willing to accept payment of his debt before its maturity, does not thereby waive his priority of lien, nor will the fact that he accepts such bonds to sell, and failing to negotiate a sale of them returns them to the corporation, constitute a satisfaction or release of his prior mortgage lien, in the absence of an agreement by him to accept such bonds in payment of his debt.

APPEAL from a judgment affirming a decree of the circuit court. J. A. Barnsback, the American Powder Company, and R. Klitzing filed a bill in the circuit court, alleging the recovery of certain judgments against the Brookside Coal and Coke Company, the execution of certain mortgages alleged to be fraudulent, and the insolvency of the company. The bill prayed the appointment of a receiver, the marshaling of the assets, and a settlement of the affairs of the company, and made it and certain mortgagees, trustees, judgment creditors, and the stockholders and officers of the company parties defendant. L. Schlosstein, by cross-bill, averred that in September, 1881, said company executed three notes to one M. J. Schott, secured by mortgage of even date therewith, duly recorded; that by virtue of an assignment of said notes to him by Schott, prior to their maturity, for a full and valuable consideration, he became the legal and equitable owner thereof; and that the lien of said mortgage is a prior lien upon the corporate property described therein. W. H. Krome, trustee in a certain deed of trust, and the owners of bonds secured thereby, by cross-bill, averred that in June, 1882, prior to the recovery of judgments by the complainants in the original bill, said company, for full consideration in good faith paid and received, executed and delivered to one Huegy certain interest-bearing bonds, signed by W. Freudenau, president, and W. Kombrink, secretary, of said company, and countersigned by said Krome, trustee, and made payable to said Huegy, or bearer, at the Mullanphy Savings Bank, June 17, 1892; that to secure the payment of said bonds with interest, said company, on June 17, 1882, by its deed of trust, conveyed to said Krome, as trustee for the holders of said

bonds, and to secure the same, and for the performance of certain covenants in said deed, certain property described in the deed, it being the interest of the company in the lands and fixtures of its coal mine. It was further averred that the lien of said deed of trust and the bonds thereby secured was superior and prior to any lien of said Schlosstein on the property, or to the lien of complainants in the original bill, or to any one else. John Alexander, by answer, averred that said company executed a mortgage, January 21, 1885, to one J. O. Evans, to secure the payment of certain certificates executed by the company, of even date therewith, amounting to three thousand five hundred dollars, and payable to the order of said Evans, at the company's office, on or before January 21, 1887; that said mortgage is a prior lien upon the property described therein; that he is the holder and owner of said certificates; that he is entitled to the appropriation of the mortgaged property to the payment thereof, to the exclusion of all other parties interested in the mortgaged property; and that said certificates were also secured by chattel mortgage executed by said company, January 25, 1885, which is a prior lien on all the personal property of said company. The answers of certain judgment creditors of said company showed judgments against it in certain amounts, and in a certain order of priority. When the cross-bills and answers to the original bill were filed, a receiver was appointed, and all the real and personal property of the said coal company sold for the sum of \$16,148.16. Said Schott, by supplemental bill, averred that since the commencement of the suit he had become the holder, for value, of the notes mentioned in Schlosstein's cross-bill, alleged a priority of the mortgage lien, and to foreclose the same. The decree of the circuit court declared the notes and mortgage in the hands of Schott to be the prior lien on the fund in the hands of the receiver to the extent of \$7,079.99; that the deed of trust to Krome is a second lien on said fund, subject to Schott's lien in favor of the holders of the bonds secured thereby, to the extent of the balance of \$16,148.16 in the hands of the receiver; that both liens before mentioned are superior to the lien of the mortgage made to Evans, and to the liens of the judgment creditors; that the holder of the Evans mortgage and the judgment creditors are not entitled to any part of the fund in the hands of the receiver. Other facts are stated in the opinion.

Krome and Hadley, John G. Irwin, and George F. McNulty,
for the appellants.

Wise and Davis, and Dale and Bradshaw, for the appellees.

BAKER, J. In order of priority in point of time, the liens upon the property of the insolvent Brookside Coal and Coke Company are: 1. The mortgage of October 19, 1881, to Martin J. Schott; 2. The deed of trust of June 17, 1882, to William H. Krome, trustee; 3. The mortgage of January 21, 1885, to John O. Evans, Sen.; and 4. The judgments, according to their seniority of date.

At the time that the mortgage to Martin J. Schott was executed, he was a stockholder and director of the corporation, and its treasurer; but the company was then, and for a considerable time thereafter, entirely solvent, and consequently his interest in and relations to it did not preclude him from loaning money to and taking a mortgage from the company. A director or officer of a solvent corporation may deal with it, loan it money, and take security therefor, in like manner as a stranger: *Beach v. Miller*, 130 Ill. 162; 17 Am. St. Rep. 291; *Roseboom v. Whittaker*, 132 Ill. 81.

At the hearing, the appellants offered in evidence page 37 of record-book 125 of the records of Madison County, for the purpose of showing what purported to be resolutions passed by the directors of the Brookside coal company, and authorizing the issue of fifteen thousand dollars in bonds, and the execution of a mortgage to secure the same. An objection was sustained to the introduction of this testimony, and on the ground that the preliminary evidence produced was not sufficient to authorize the use of secondary evidence. The bonds and the Krome deed of trust were executed by the president and secretary of the corporation, and under its seal, and this was *prima facie* evidence that they were executed by the authority of the company: *Wood v. Whelen*, 93 Ill. 153. No claim was made that the bonds and deed of trust were unauthorized, — in fact, their validity was conceded; but appellants desired to have the resolutions in evidence, in furtherance of their claim that the Schott notes and mortgage should be postponed, and the deed of trust and bonds given a priority of lien.

Resolutions adopted by private corporations are not such instruments as are entitled, under the statute, to be recorded in the office of the recorder of deeds. Assuming that resolu-

tions were passed that authorized the making of the deed and bonds, the natural and legitimate presumption is, that either a record was made of them by the secretary of the company in the book containing the record of the proceedings of the board of directors, or else that the paper containing such resolutions was retained and preserved by the secretary, or both. If a paper is shown to have been in particular hands, then the person must be produced into whose hands it has been traced; or if the natural and legitimate presumption is that it is in certain hands, then it must be proved by legal evidence that it is not there, before secondary evidence of its contents is admissible. The evidence must satisfy the court that the paper is destroyed or cannot be found: *Mariner v. Saunders*, 5 Gilm. 113. Here it was shown that the resolutions could not be found in the office of the recorder; but in any event, they were only left with him for a temporary purpose, and when they had been recorded, they, presumably, were returned to the possession of the secretary of the corporation. It was further shown that neither they nor the book containing the record of the proceedings of the board of directors were in the hands of either the receiver or of the attorney of the assignee, who had custody of the corporate property prior to the appointment of a receiver; but neither the secretary, president, nor assignee of the company was produced as a witness, nor was the deposition of either taken. Although all three were either non-residents or out of the state at the time of the hearing, yet no reason is perceived why their testimony could not have been taken. The record-book and resolutions may now be in the hands of either of the three, and yet all the evidence in this record be true. The conviction that naturally arises from the evidence is, that the record-book is in the possession of one or another of them. There was no error in refusing to admit secondary evidence of the resolutions.

It is claimed that it was error to exclude proof of representations made by Freudenau, president of the company, to Kammerer, cashier of the Mullanphy Savings Bank, at the time some of the bonds were pledged to the bank, that they were a first lien upon the property described in the deed of trust. The representations were made in the summer or fall of 1883, nearly two years after Martin J. Schott had taken his mortgage, and in the absence of said Schott. If it should be assumed that the declarations of Freudenau were within the scope of his agency to negotiate the bonds for the corporation,

and therefore binding upon said Schott to the extent of his interest as a stockholder therein, yet it would seem that in respect to the rights which he held adversely to the corporation, and as its mortgagee, such declarations would not be competent testimony. And if such representations were not admissible against him as mortgagee, then, as matter of course, they were not admissible against his assignee, who was complainant in the supplemental bill, and is appellee here.

It is urged that if Martin J. Schott agreed to accept payment before his money was due, and out of moneys to be obtained by the sale of second-mortgage bonds, then the declarations of Freudenuau were competent and relevant testimony in the contention for priority between the first and second mortgages. This argument proceeds upon the theory of agency; but suffice it, in this connection, to say, that it is elementary law that an agency cannot be shown by the statements of the supposed agent.

Preliminary to a consideration of the merits of the controversy between appellants and appellee, it may be well enough to ascertain the *status* of the latter in respect to the equities claimed by the former. It is settled law, announced in *Chicago etc. R'y Co. v. Loewenthal*, 93 Ill. 433, and in many other cases, that when the assignee of commercial paper secured by mortgage seeks relief in equity by foreclosure of the mortgage, the mortgagor may successfully interpose any defense which would have been available against the original payee or holder of the paper. This rule, however, has reference only to equities existing in the original obligor, and not to latent equities against the assignor residing in third persons: *Olds v. Cummings*, 31 Ill. 188; *Walker v. Dement*, 42 Ill. 272; *Silverman v. Bullock*, 98 Ill. 11. In the case last cited the statement is, that the assignee takes subject only to equities existing in favor of the mortgagor as against the assignor, and not subject to latent equities in favor of third persons, in the subject involved in the assignment, of which he had no notice. This brings us to the point that appellee, at and prior to the time that he purchased the mortgage debt and took an assignment of the notes and mortgage of September 22, 1881, had notice, in at least two several ways, of the equities, if any, existing in favor of the trustee and bond-holders under the deed of trust, and the mortgagee in said mortgage of 1881. In the first place, before that time the trustee and bond-holders under the trust

deed of 1882 had filed their cross-bill, wherein they claimed that the lien of said deed of trust was superior to the lien alleged to exist on the property by virtue of the mortgage of 1881. Appellee, being a purchaser *pendente lite*, was chargeable with notice of the allegations of this cross-bill. Besides this, the evidence is clear and undisputed that the notes and mortgage were purchased for appellee, and assignments taken to him, by Martin J. Schott, who was acting as his authorized agent in the matter. The doctrine is, that notice to an agent of any fact or facts connected with the business in which he is employed is notice to the principal: *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455; 29 Am. Rep. 43; *Flower v. Elwood*, 66 Ill. 438. Martin J. Schott, as matter of course, had full knowledge of all that had transpired between himself and either the corporation, the trustee in the trust deed, or the holders of bonds secured by the same, in respect to both the mortgage given to him and the trust deed; and appellee stands in the shoes of Martin J. Schott, the mortgagee, and holds the mortgage of 1881, subject to all the equities, if any there be, existing in favor of the trustee and bond-holders as against said Martin J. Schott. Does any matter appear in the record which would estop Martin J. Schott from claiming that the mortgage to him is the first and superior lien upon the property of the coal and coke company?

It is insisted that it was the intention of the corporation and of said Schott, and that there was an agreement between them to the effect, that the deed of trust should be made a first lien upon the property, and that this should be accomplished by Schott accepting payment of his mortgage debt before it was due, and such payment to be made out of moneys to be obtained by sale of second-mortgage bonds. It is not claimed that there is any direct proof whatever of such a contract. Nothing appears upon the face of the bonds to indicate that they either were or were intended to be first-mortgage bonds, or secured by a first lien upon the mortgaged property. The only thing contained in the deed of trust that is suggested as amounting to a representation of priority is the fact that the words "grant, bargain, and sell" are used therein. These words are, under the statute, a warranty of the company that the lands conveyed and mortgaged were free and clear of all encumbrances made by the company, and a warranty of the company to the purchasers of the bonds that there was no

other mortgage made by it on the property. But the covenants were the covenants of the corporation alone, and not the covenants of the individual directors of the corporation, and no suit could be brought for breach of such covenants against any of the directors. From the fact of the insertion of a covenant against encumbrances, an implication arose of the probability or possibility that there were prior encumbrances, for otherwise there was no occasion for furnishing a remedy by way of an action for breach of covenant. The deed was not signed by Schott, but was executed by Freudenau, president, in the name of the company, and attested by Kombrink, secretary; and the incorporation therein of the covenant implied from the words "grant, bargain, and sell" cannot be regarded as a fraudulent representation on the part of Schott, one of the directors of the company, that would preclude him from claiming the benefit of the prior mortgage held by him.

It appears from the evidence that late in May or early in June, 1882, there was a meeting of the stockholders of the Brookside coal company, at which Freudenau, its president, Schott, and others were present; that Freudenau made a statement of its financial condition, in the presence and hearing of Schott, in which he summed up its indebtedness, stating its total to between fourteen thousand and fifteen thousand dollars, including the notes and mortgage of Schott; that he suggested that a loan of fifteen thousand dollars was sufficient to pay all the debts of the company, including the Schott mortgage, and stated that it would be for the interests of the company to issue bonds to the amount of fifteen thousand dollars, and execute a mortgage security, for the purpose of raising money to pay off the total indebtedness of the company. From the circumstance that Schott made no response or objection to these suggestions, and from the further circumstance, that appears from the recitals in the deed of trust, that the bonds were issued "in pursuance of a vote of all the directors of said company," it may be inferred that Schott was willing to receive payment of his debt prior to its maturity, but it cannot be justly deduced therefrom that he consented to waive his priority of lien without payment, in money, of such debt.

It seems that the board of directors of the company consisted of three members, — Freudenau, the president, Kombrink, the secretary, who was his brother-in-law, and Schott,

the treasurer; that the two former managed its business affairs, and that Schott was treasurer only in name, neither the proceeds of the bonds nor the other funds of the company passing through his hands.

In the latter part of 1882, ten of the bonds secured by the deed of trust, and of the face value of five thousand dollars, were delivered to Schott, and it is claimed that as he received the same, he is thereby estopped from saying that they were not in satisfaction of his debt and in discharge of his mortgage lien. The notes and mortgage of 1881 were not surrendered to the company, but have been continuously retained and held by Schott and his assignees. We think that the evidence satisfactorily shows that Schott did not accept the bonds in payment of his debt, but that the conditional arrangement between him and Freudenau was, that he should take the bonds and try to sell them to a bank in Highland that held a note against him, and that if he sold them he was to surrender his note and mortgage to Freudenau, and receive from him the unpaid interest, and that if he did not sell them they were to be returned to Freudenau; that the bank declined to buy, because the bands bore only seven per cent interest, while Schott's note bore eight per cent interest, and because it wanted nothing to do with coal mines; and that thereupon some of the bonds were given back to Freudenau, and some delivered to the Mullanphy Bank on the order of Freudenau, and that all ten of the bonds were, after their return, negotiated and disposed of for the Brookside coal company by Freudenau. It does not appear that any of the proceeds of the bonds were used for other than corporate purposes.

The transactions above mentioned took place in 1881, 1882, and 1883. It is not shown that in 1881, 1882, or 1883 the Brookside company was insolvent. Schott, therefore, in those years, as director and treasurer of the corporation, was trustee and agent of the company and its stockholders only. He at that time owed no duties or obligations to appellants or to the creditors that would have prevented him from dealing as he did with the company and with the bonds. The assets of the corporation were not then a trust fund for the payment of its creditors: *Beach v. Miller*, 130 Ill. 162; 17 Am. St. Rep. 291; *Roseboom v. Whittaker*, 132 Ill. 81. Schott did not appropriate the money or bonds of the company to his own use. He sim-

ply retained his notes and mortgage, which were a first lien upon property of the company, and he had a right so to do. It may be that in 1882 and 1883 he was negligent in the performance of his duties as director and treasurer, in not seeing that the one fourth of one cent per bushel on all coal mined was paid to the trustee, as a further security, as provided in the deed of trust, and otherwise, but the pleadings in the cause did not proceed upon any such ground; and besides this, the trustee in the deed of trust and the bond-holders were guilty of like negligence. Moreover, the trustee had actual notice of Schott's mortgage, and the bond-holders had constructive notice of the same from the public records. The bond-holders neglected to examine the records, and neither they nor the trustee made inquiries of Schott in regard to his mortgage. In view of the greater negligence of appellants, it would seem inequitable and unjust, even if the nature of the case and character of the pleadings permitted, that appellants should shift the burden of the loss either to the shoulders of Martin J. Schott or of appellee.

We find no sufficient ground for disturbing the decree of the circuit court. The judgment of the appellate court is affirmed.

CORPORATIONS — POWER OF DIRECTORS TO DEAL WITH. — A director of a solvent corporation may deal with the corporation, loan it money, take security therefor, and enforce its payment: *Beach v. Miller*, 130 Ill. 162; 17 Am. St. Rep. 291, and extended note; and its assets do not become a trust fund for the benefit of creditors until the corporation becomes insolvent: *Roseboom v. Whittaker*, 132 Ill. 81; *Welch v. Importers' etc. Bank*, 122 N. Y. 177. See *Sanders v. Page*, 11 Col. 518.

CORPORATIONS — AUTHORITY OF OFFICERS TO MAKE CONTRACT. — Where the president and secretary of a corporation execute a contract in behalf of the company, not outside of its regular business, it is *prima facie* evidence that it was executed with authority: *Sherman etc. Co. v. Swigart*, 43 Kan. 292; 19 Am. St. Rep. 137, and note.

EVIDENCE — LOST RECORD — SECONDARY EVIDENCE TO PROVE, WHEN ADMISSIBLE. — A party seeking to introduce secondary evidence of a lost writing must first show that he cannot produce the original document: *Wiseman v. North P. R. R. Co.*, 20 Or. 425; 23 Am. St. Rep. 135, and note; *Howe v. Fleming*, 123 Ind. 262; *Potts v. State*, 26 Tex. App. 663.

EVIDENCE — AGENCY — PROOF OF AUTHORITY FROM DECLARATIONS OF AGENT. — Declarations of authority by an agent are not competent evidence of his agency: *Three Rivers Nat. Bank v. Gilchrist*, 83 Mich. 253. As to when the declarations of a party in his own favor are admissible in evidence, see note to *Baker v. Kelly*, 93 Am. Dec. 279.

CORPORATIONS — RIGHT TO PREFER DIRECTORS AS CREDITORS. — A corporation may prefer one creditor to another, and such preference may be

exercised in favor of a director, even though he voted for the mortgage given to secure his indebtedness: *Warfield etc. Co. v. Marshall County etc. Co.*, 72 Iowa, 666; 2 Am. St. Rep. 263, and note. A corporation may execute a mortgage to its directors as preferred creditors: *Garrett v. Burlington etc. Co.*, 59 Am. Rep. 661, and extended note.

LIS PENDENS — RIGHTS OF PURCHASERS. — A purchaser *pendente lite* of realty, whether the action be at law or in equity, takes it subject to any title or interest adverse to that of his grantor ultimately recognized in the pending litigation: *Cheever v. Minton*, 12 Col. 557; 13 Am. St. Rep. 258, and note.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

JOHNSTON v. STATE.

[128 INDIANA, 16.]

MANDAMUS PROPER TO COMPEL ELECTION OFFICERS TO DETERMINE TIE VOTE BY LOT. — Where election officers, after certifying the result of an election to be a tie vote, adjourn without determining by lot the person entitled to the office, they may be compelled by *mandamus* to reassemble and take the action required by law.

CONSTITUTIONAL LAW — LEGISLATURE MAY PROVIDE THAT TIE VOTE BE DETERMINED BY LOT. — An act of the legislature, which provides that where an election results in a tie vote for opposing candidates the judges of election shall determine by lot the person entitled to the office, is valid, and does not conflict with a constitutional provision requiring all elections to be by ballot.

CANDIDATE NOT ESTOPPED TO CLAIM OFFICE BECAUSE HE REQUESTED ELECTION OFFICERS NOT TO DETERMINE RESULT. — A candidate for office is not estopped from urging his claim to the office by the fact that he requested the officers of election not to determine the result of the election.

MANDAMUS. The opinion states the case.

S. A. Bonner, M. D. Tackett, B. F. Bennett, D. A. Myers, and W. Woodfill, for the appellants.

J. K. Ewing, C. Ewing, J. D. Miller, and F. E. Gavin, for the appellee.

ELLIOTT, J. The relator, Oliver C. Sefton, William A. Williams, and James Parker, were candidates for the office of township trustee. Alexander C. Johnston was the inspector, and Samuel T. Meek and John Foley were the judges of the election. At the close of the election the votes cast were counted and canvassed by the election board, and it was

found that the relator had received eighty-nine votes, Williams eighty-nine votes, and Parker two votes. The election officers certified that the relator and Williams had received the highest number of votes cast at the election; they refused, however, to determine by lot which of the two candidates was entitled to the office, and although requested in writing, refused to reassemble and determine which of the two candidates who received the highest number of votes should be declared entitled to the office of township trustee. Our statute provides that "if two or more have the highest and an equal number of votes for the same office, such judges shall, when the result is certified, determine by lot the person entitled to the office; and the next day the inspector shall make out and deliver to the person elected, when demanded, a certificate for each person elected to any office in said township, except justices of the peace": Rev. Stats. 1881, sec. 4736.

Assuming that the statutory provision quoted is valid, the remedy adopted by the relator (*mandamus*) is appropriate. The duties of election officers, when prescribed by statute, as in this instance, are imperative, and performance may be coerced by the writ of *mandamus*. Nor can the election officers evade their duties by adjourning without taking the action required by law. In discussing this question, the supreme court of Michigan said, in the case of *Attorney-General v. Board etc.*, 64 Mich. 607, in speaking of the members of the election board, that "until they have done so, they have no right to dissolve their meeting. They can only get out of their office by completing its work. It would be worse than absurd to allow a board of canvassers to defeat the popular will and destroy an election by refusing or neglecting to do what the law requires them to do." The cases are harmonious upon the proposition we have asserted: *Brower v. O'Brien*, 2 Ind. 423; *Kisler v. Cameron*, 39 Ind. 488; *Moore v. Kessler*, 59 Ind. 152; *State v. Gibbs*, 13 Fla. 55; 7 Am. Rep. 233; *Hagerty v. Arnold*, 13 Kan. 367; *Lewis v. Commissioners etc.*, 16 Kan. 102; 22 Am. Rep. 275; *People v. Schiellein*, 95 N. Y. 124; *State v. Stearns*, 11 Neb. 104; *State v. Peacock*, 15 Neb. 442; *People v. Nordheim*, 99 Ill. 553.

The question upon which the case hinges is, whether the statutory provision quoted is valid. The appellants' counsel ingeniously and plausibly argue that the provision is invalid, for the reason that it is in conflict with the constitutional

provision that all elections shall be by ballot: Const., art. 2, sec. 13.

We cannot concur with counsel, that where an election is held and results in a tie vote for opposing candidates, the general assembly may not provide for determining the right to the office otherwise than by making provision for another election.

Constitutions are framed by existing and organized society, and are to be construed with reference to well-known practices and usages: *State v. Noble*, 118 Ind. 350 (361); 10 Am. St. Rep. 143; *Durham v. State*, 117 Ind. 477; Cooley's Constitutional Limitations, 5th ed., 73. We know that the practice of determining a tie vote by lot prevailed before our constitution was adopted, and it is our duty to presume that the framers of that instrument were not ignorant or unmindful of this ancient usage. It is, therefore, no more than reasonable to hold that a statute providing for an election by ballot is valid, although it also provides for determining a tie vote by lot, for the framers of the constitution may well be deemed to have had this usage in view, and to have intended that it should be resorted to in cases where an election should result in a tie between opposing candidates. Such a statute as the one before us does give the electors an opportunity to vote by ballot, and affixes to each vote all the force it is possible to assign it. In no respect is the elector's right abridged or limited; all that is done is to provide that in cases where the electors fail to make a choice, the choice may be determined by lot between the candidates who have received the highest number of votes. This course gives to all the votes cast full weight and force, and prevents the nullification of the election where a tie vote results. Unless there is power in the general assembly to provide for the determination of a tie vote, an incumbent of an office might hold far beyond his term, since it is conceivable that many elections might result in a tie.

The authorities give full support to our assertion that the legislature may provide that a tie vote shall be determined by lot: *Webster v. Gilmore*, 91 Ill. 324; *Keeler v. Robertson*, 27 Mich. 116; *People v. Sutherland*, 41 Mich. 177; *State v. McKinnon*, 8 Or. 485; *State v. Wilkinson*, 23 Neb. 710; *Hammock v. Barnes*, 4 Bush, 390.

We have found no judicial decision conflicting with the cases to which we have referred, nor have we been referred to

any by appellants' counsel. The report of the Congressional committee to which we are referred cannot be regarded as authority.

While we are satisfied that no statute can be upheld which assumes to destroy the right of the inhabitants of a township to elect their own trustee, yet we are also satisfied that where a full opportunity is given them to make a choice, and they equally divide their votes, it is within the power of the general assembly to make provision for determining the result of the election. Our constitution provides that "such other county and township officers as may be necessary shall be elected or appointed in such manner as may be prescribed by law": Const., art. 6, sec. 3. It seems clear to us, that, taking this provision in connection with the general one respecting elections, and combining them, in accordance with the principles to which we have referred, the general assembly did not transcend its power in enacting the statute under consideration.

Counsel's argument that the policy of determining the right to an office by lot is an evil one might have weight with a legislative assembly, but it can have none with the courts. Questions of policy and expediency are legislative, and not judicial: *Beauchamp v. State*, 6 Blackf. 299; *Hedderich v. State*, 101 Ind. 564; 51 Am. Rep. 768, and authorities cited.

The appellants' position, that the relator cannot successfully urge his claim to the office for the reason that he created an estoppel against himself by requesting the election officers not to determine the result of the election, cannot be defended. The duties of the election officers were prescribed by a public law, and all the interested parties had equal knowledge, so that no estoppel could possibly arise. But more than this: the public had an interest in having the election officers perform the duty enjoined upon them by law, and it was not for the relator to relieve them from that duty; and this they were bound to know: *School District v. Root*, 61 Mich. 373.

Judgment affirmed.

MANDAMUS — ELECTIONS. — *Mandamus* lies to compel constitutional officers to perform duties required of them by statute: *State v. Houston*, 40 La. Ann. 393; 8 Am. St. Rep. 532; *State v. Commissioners*, 23 Fla. 632. *Mandamus* lies to compel election commissioners to declare the result of an election: *State v. Gibbs*, 13 Fla. 55; 7 Am. Rep. 233; *Lewis v. Commissioners*, 16 Kan. 102; 22 Am. Rep. 275, and note. See *State v. Wilkinson*, 23 Neb. 710.

MILLER v. LOUISVILLE, NEW ALBANY, AND CHICAGO RAILWAY COMPANY.

[128 INDIANA, 97.]

NEGLIGENCE OF DRIVER OF WAGON NOT IMPUTABLE TO PERSON RIDING WITH HIM. — The negligence of the driver of a wagon and team which collides with a railway train does not necessarily preclude a recovery by a person riding in the wagon with such negligent driver; but such person cannot recover in such a case unless it affirmatively appears that his own negligence did not proximately contribute to his injury.

FAILURE OF PERSON RIDING WITH DRIVER OF WAGON TO LOOK AND LISTEN FOR TRAIN AT CROSSING CONTRIBUTORY NEGLIGENCE. — Where a wife is riding in a wagon with her husband, who is driving, at a railway crossing known to her to be dangerous, it is her duty to look and listen for approaching trains, and if, while a train is approaching in full view, she takes no precautions to warn him or to avert the threatened danger, she is guilty of contributory negligence, and no recovery can be had for injuries received by her.

PHOTOGRAPH OF SCENE OF RAILWAY ACCIDENT ADMISSIBLE IN EVIDENCE. — It is not error to permit a witness to testify that a photograph introduced in evidence is a correct representation of a railway crossing at which an accident occurred.

RELATIONSHIP OF JUROR TO COUNSEL NOT GROUND FOR SETTING ASIDE VERDICT WHEN. — The fact that a juror was permitted to serve, who was the husband of a niece of one of the defendant's attorneys, is not a ground for setting aside the verdict.

ACTION for damages. The opinion states the case.

J. R. Coffroth, T. A. Stuart, F. Gaylord, and J. F. McHugh, for the appellant.

W. S. Kinnan, E. C. Field, and C. C. Matson, for the appellee.

ELLIOTT, J. The facts, as they appear in the special verdict, are, in substance, these: The track of the appellee crosses a public highway not far from the city of Lafayette. The railroad runs from north to south, and the highway from east to west, but neither runs on a direct line. The track approaches the crossing from the west on a descending grade of about sixty feet to the mile, and the grade of the highway from the south descends to the crossing at about two hundred and fifty feet per mile. On the south side of the railroad, and extending from a point one half-mile west of the crossing to a distance of 270 feet of the crossing, there is a hill thirty feet high. A side-track extends along the main track from a point seventeen rods west of the crossing eastward, and beyond the highway. On the twenty-sixth day of June, 1886,

there were five freight-cars, each thirty feet in length, standing on the side-track; one of these cars was a box-car ten feet high, and the others were platform-cars. Beginning at a point in the public highway fifty feet distant in a southeasterly direction from the railroad, was an open space where the track was plainly visible to one traveling on the highway for more than one fourth of a mile. The crossing was a dangerous one, and the appellant's intestate and her husband passed over it as often as once in every two weeks, and knew that the crossing was a dangerous one. On the twenty-sixth day of June, 1886, the intestate was riding with her husband along the highway, and at the time they reached a point within 150 feet of the crossing a train was approaching from the west, and was in plain view all the time for a distance westward on the track for more than one fourth of a mile, but the view of the railroad track was partially obstructed by the freight-cars on the side-track. The intestate and her husband were riding in an ordinary farm-wagon, drawn by two horses; the husband drove and managed the team. The whistle was not sounded until the train was within seventy rods of the crossing, nor was the bell rung until after the whistle was sounded. The engineer saw the intestate and her husband when within two hundred feet of the crossing, and sounded the danger signal; but the husband, although he endeavored to urge his horses across the track, failed to succeed in clearing it, and the wagon was struck by the locomotive, and both the husband and his wife were killed. At a point in the highway about one hundred feet from the crossing, the intestate's husband apparently checked his horses; the train was then in full view, and the engineer, seeing the act of the husband, was induced to believe that he was going to wait until the train had passed the crossing. The intestate was "not prevented in any manner or in any way restrained from looking or listening for an approaching train," and nothing was done by her to warn her husband, nor did she look or listen.

It is quite clear that the husband of the appellant's intestate was guilty of contributory negligence. It is evident from the facts stated in the special verdict that the slightest care on his part would have enabled him to see and avoid the approaching train. But the fact that the driver of a wagon and team which collides with a railroad train is negligent does not necessarily preclude a recovery by one riding in the

wagon with such negligent driver. The doctrine of *Thorogood v. Bryan*, 8 Com. B. 115, has never been sanctioned by this court: *Pittsburgh etc. R. R. Co. v. Spencer*, 98 Ind. 186, and cases cited; *Town of Knightstown v. Musgrove*, 116 Ind. 121; 9 Am. St. Rep. 827; *Michigan City v. Boeckling*, 122 Ind. 39. The doctrine has, indeed, been overthrown in England, and is repudiated by almost all of the courts of this country: See authorities cited in notes on pages 630 and 632 of Elliott on Roads and Streets. Rejecting, as we do, the doctrine of imputed negligence, we are nevertheless required to hold that there can be no recovery in this action. We are led to this conclusion by the fact that the intestate was not shown to be free from contributory negligence. It has long been the settled law of this state that a plaintiff cannot recover in such a case as this, unless it affirmatively appears that his own negligence did not proximately contribute to his injury: *Hathaway v. Toledo etc. R'y Co.*, 46 Ind. 25; *Toledo etc. R'y Co. v. Brannagan*, 75 Ind. 490; *Cincinnati etc. R. R. Co. v. Butler*, 103 Ind. 31; *Indiana etc. R'y Co. v. Greene*, 106 Ind. 279; 55 Am. Rep. 736; *Cones v. Cincinnati etc. R'y Co.*, 114 Ind. 328; *Ohio etc. R'y Co. v. Hill*, 117 Ind. 56; *Chicago etc. R'y Co. v. Hedges*, 118 Ind. 5; *Mann v. Belt R. R. etc. Co.*, 128 Ind. 138.

The fact that there was no contributory negligence may undoubtedly be inferred from circumstances, but to authorize such an inference there must be evidence of circumstances from which the inference can be legitimately drawn. There are no circumstances in this instance authorizing such an inference. The intestate approached a crossing known to her to be dangerous, and approached it when a train was in full view; she took no precautions to warn her husband or to avert the threatened danger, although slight care might have avoided it. While the husband's negligence is not to be imputed to her, she was, nevertheless, under a duty to herself to exercise ordinary care. The rule we adopt is laid down in the well-reasoned case of *Brickell v. New York etc. R. R. Co.*, 120 N. Y. 290; 17 Am. St. Rep. 648.

In the case of *Hoag v. New York Central R. R. Co.*, 111 N. Y. 199, it was said, in speaking of a case where the wife was seated in a wagon drawn by a team which her husband was driving, that "if they did not see it [the train], or at least the deceased did not see it, she was negligent, for she was bound to look and listen, and the facts show that if she had looked she could have seen, and would have seen, the

approaching train. She had no right, because her husband was driving, to omit some reasonable and prudent care to see for herself that the crossing was safe." The statement was approved in the later case. This statement applies with great force to the case before us, for here the wagon was stopped, the engineer had reason to believe the husband did not intend to attempt to cross in front of the train, there was no obstruction to the view, and the wife knew that the crossing was an unusually dangerous one. Under such circumstances, she was certainly bound to use her sense of sight and hearing, and to warn her husband by word or act. In the case of *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514, 15 Am. St. Rep. 733, the same general doctrine is declared, and it is carried somewhat further than we think is warranted by principle or authority. If it affirmatively appeared in this case that no want of care was attributable to the deceased, we should hold that the fact that the negligence of the husband concurred with that of the railroad company in producing the injury would not bar a recovery, for we understand the law to be well settled, that although the negligence of a third person concurs in producing an injury, still the plaintiff, if free from fault, may recover: *Rogers v. Leyden*, 127 Ind. 50, and cases cited; but here the plaintiff was not free from contributory fault. There is in our own reports a recent case that we must overrule if we give judgment in favor of the appellant. We refer to the case of *Cincinnati etc. R'y Co. v. Howard*, 124 Ind. 280; 19 Am. St. Rep. 96. In that case a daughter was riding in a buggy drawn by a horse driven by her father, and it was held that the trial court erred in refusing to give an instruction reading thus: "The burden is on the plaintiff to show, by a preponderance of the evidence, that she and her father vigilantly used their eyes and ears to ascertain if a train of cars was approaching, and if this has not been shown to you by a preponderance of the evidence, the plaintiff cannot recover." This is an unequivocal assertion of the rule we have stated, and we cannot, in view of the authorities, declare that the decision in the case cited is not the law; on the contrary, we think it correctly states the law upon the point under consideration. It is true that some of the expressions found in the opinion are opposed by earlier as well as later cases, and such expressions must be deemed erroneous, but they do not bear upon this point.

We do not undertake to lay down a general rule which

shall apply to all cases of this class; we simply adjudge that, upon the facts stated in the special verdict, it cannot be assumed that there was no contributory negligence on the part of the deceased, or that there was any fact excusing her failure to exercise such care and vigilance as the law requires.

The other questions in the case arise on the motion denying a new trial.

There was no error in permitting a witness to testify that a photograph introduced in evidence was a correct representation of the crossing and its surroundings: *Keyes v. State*, 122 Ind. 527.

A witness for the appellee was permitted to state what was said by him, at the time the whistle was sounded, to a lady passenger on the train with him. We need not, and do not, decide whether this evidence was competent for the purpose of enabling the witness to fix the time when he heard the whistle; for, granting that it was incompetent, still there can be no reversal of the judgment, inasmuch as the jury found for the appellant upon the question to which the evidence was directed, and hence it is obvious that if there was error it was harmless.

Appellant asks a reversal upon the ground that the appellee knowingly permitted a juror to serve who was the husband of a niece of the wife of one of the appellee's attorneys. The contention of appellant cannot be sustained. Such a relationship of a juror to one of the counsel cannot, under the long existing rule, be deemed cause for setting aside a verdict: *Thompson and Merriam on Juries*, 181.

Judgment affirmed.

NEGLIGENCE — NEGLIGENCE OF DRIVER NOT IMPUTED TO PASSENGER. — The negligence of the driver of a private vehicle cannot be imputed to one riding with him, when the latter is himself free from blame: *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514; 15 Am. St. Rep. 733, and note; *Noyes v. Boscawen*, 64 N. H. 361; 10 Am. St. Rep. 410, and note; *Galveston etc. R'y Co. v. Kutac*, 72 Tex. 644.

PHOTOGRAPHS AS EVIDENCE. — The jury is entitled to use photographs of the premises where the injury occurred, when they are produced in evidence: *Bedell v. Berkey*, 76 Mich. 435; 15 Am. St. Rep. 370; and any change in the appearance of the locality is open to explanation: *Dyson v. New York etc. R. R. Co.*, 57 Conn. 9; 14 Am. St. Rep. 82. See extended note to *Eborn v. Zimpelman*, 26 Am. Rep. 315, 319-321. See *Travelers Ins. Co. v. Sheppard*, 85 Ga. 754.

ELLIS v. BASSETT.

[128 INDIANA, 118.]

WAY OF NECESSITY, GRANTEE OF LAND ENTITLED TO, WHEN. — Where the owner of a tract of land conveys to another a part thereof lying neither on the public highway nor on the grantee's other land, the deed, by presumption of law, carries with it to the grantee a right of way over the unconveyed part; and such grantee is entitled to such way of necessity without showing that he is unable to obtain a way to the highway over the lands of others.

WAY OF NECESSITY IN CASE OF PARTITION AMONG HEIRS. — A partition of real estate among heirs carries with it, by implication, the same right of way from one part to and over the other as had been plainly and obviously enjoyed by the common ancestor, in so far as it is reasonably necessary for the enjoyment of each part.

NECESSARY SERVITUDE CONTINUED AFTER SEVERANCE OF OWNERSHIP. — Where the owner of an estate imposes upon one part an apparent and obvious servitude in favor of another, and at the time of the severance of ownership such servitude is in use, and is reasonably necessary for the fair enjoyment of the other, then, whether the severance is by voluntary alienation or by judicial proceedings, the use is continued by operation of law.

NOTICE OF EXISTENCE OF WAY OF NECESSITY, WHAT SUFFICIENT. — Where a way is a way of necessity, is open and visible, and has been used continuously for many years, these facts constitute sufficient notice to a purchaser of the existence of the easement.

ACTION to quiet title. The opinion states the case.

J. W. Cooper, B. F. Harness, J. O'Brien, and C. C. Shirley, for the appellant.

J. C. Blacklidge, W. E. Blacklidge, and B. C. Moon, for the appellee.

MILLER, J. The appellee sued the appellant to quiet his title to an easement along and over the land of the appellant.

A demurrer was overruled to the complaint, and the appellant electing to stand by his demurrer, final judgment was rendered against him.

The sufficiency of the complaint is the only question before us.

The complaint alleges, in substance, the following facts: That Henry Bassett, Sen., in his lifetime, was the owner and in possession of a tract of twenty acres of land, bounded on the north by a public highway, it being the only highway adjoining his land; that Henry Bassett, Sen., died in the year 1880, and upon partition of his real estate, five acres on the north end of the twenty-acre tract was set off to his widow, Matilda Bassett; that afterwards, in the year 1881, the other

fifteen acres of land were sold at administrator's sale to the appellee, who received, and on the nineteenth day of December, 1881, caused to be recorded, an administrator's deed therefor; that on the fourteenth day of March, 1883, the widow sold and conveyed the five-acre tract of land to the appellant.

It is also alleged that for many years previous to his death Henry Bassett, Sen., used as a roadway a strip of ground, about one rod in width, along the east side of the tract of land to reach the public highway on the north; that the way was, and still is, necessary to the proper use and enjoyment of the fifteen-acre tract of land; that at the time the plaintiff purchased the fifteen acres of land, and for many years prior thereto, this way was open and visible, and had for a long time been used by the owner for the passage of men, horses, and vehicles to and from the southern part of the twenty acres to the highway on the north; that from the time of his purchase of the fifteen-acre tract of land he used the way as it had formerly been used, by and with the knowledge and consent of the widow, while she owned and held the five-acre tract, and with the knowledge and consent of the defendant, Rufus Ellis, after he purchased the same, until the autumn of the year 1886, when the defendant obstructed, and still obstructs, the use of the way by building fences across, and denying the right of the plaintiff to use the same in passing to and from the fifteen-acre tract to the public highway on the north; that the lands on the east, south, and west of the fifteen-acre tract are owned by other persons, and the plaintiff has no right of way over the said lands from his land to any public highway.

The circumstances under which a way of necessity will arise is thus stated in Bishop on Non-contract Law, sec. 872: "If one conveys to another, out of a parcel of land, a part lying neither on the highway nor on the grantee's other land, it will be useless to the new owner unless he can have access to it; hence, by presumption of law, the deed carries with it to the grantee a right of way over the unconveyed part."

In Ballard on Real Estate Statutes, sec. 371, it is thus defined: "Most common of ways implied are ways from necessity, as where one sells another land so surrounded by other lands as to be inaccessible except by passing over such grantor's land, the law implies the grant of way over such land."

To the same effect we cite Washburn on Easements, 4th ed., 258; Goddard on Easements, 269; *Anderson v. Buchanan*, 8 Ind. 132; *Stewart v. Hartman*, 46 Ind. 331; *Steel v. Grigsby*, 79 Ind. 184; *Logan v. Stogsdale*, 123 Ind. 372.

"A way of necessity can only be raised out of land granted or reserved by the grantor, but not out of the land of a stranger. For if one owns land to which he has no access except over lands of a stranger, he has not thereby any right to go across these for the purpose of reaching his own": 2 Washburn on Real Property, 3d ed., 282; *Stewart v. Hartman*, 46 Ind. 341.

A right of way, upon a severance of the estate by partition between heirs, sometimes arises when it would not exist in case of a conveyance of one portion of the premises. And it may be laid down as a general rule that a partition of real estate among heirs carries with it by implication the same right of way from one part to and over the other as had been plainly and obviously enjoyed by the common ancestor, in so far as it is reasonably necessary for the enjoyment of each part: *Goodall v. Godfrey*, 53 Vt. 219; 38 Am. Rep. 671; *Collins v. Prentice*, 15 Conn. 39; 38 Am. Dec. 61; *Burwell v. Hobson*, 12 Gratt. 322; 65 Am. Dec. 247; *Kilgour v. Ashcom*, 5 Har. & J. 82; *Seymour v. Lewis*, 13 N. J. Eq. 439; 78 Am. Dec. 108; *Elliott v. Salle*, 14 Ohio St. 10.

Where the owner of an estate imposes upon one part an apparent and obvious servitude in favor of another, and at the time of the severance of ownership such servitude is in use, and is reasonably necessary for the fair enjoyment of the other, then, whether the severance is by voluntary alienation or by judicial proceedings, the use is continued by operation of law: *John Hancock M. L. Ins. Co. v. Patterson*, 103 Ind. 582; 53 Am. Rep. 550.

The appellant contends that the complaint is defective for failing to allege that the plaintiff was unable to obtain a way to the highway over the lands of others. This point has been decided contrary to the views of the appellant: *Pernam v. Wead*, 2 Mass. 203; 3 Am. Dec. 43; *Collins v. Prentice*, 15 Conn. 423.

It does not detract from the weight to be given these cases that at the time they were decided the laws of the respective states permitted the establishment of private ways upon payment of the damages caused by their opening.

The appellant also contends that the way claimed was not

appurtenant to the dominant estate so as to pass with it in conveyances of the fee; also that the complaint fails to show that the appellant had notice at the time of his purchase of the easement with which it was charged.

The facts stated in the complaint show that the way was a way of necessity, that it was open and visible, and had been used continuously for many years.

The same objections were made to the complaint in *Robinson v. Thrailkill*, 110 Ind. 117, in passing upon which Elliott, C. J., says: "The complaint shows that the road purchased by the grantor of the appellees was 'in almost constant use,' and this user was notice to the appellant. It is a familiar rule that possession is sufficient to put a purchaser upon inquiry, and that means of knowledge is equivalent to knowledge."

This is a concise statement of the law upon the subject, and is sustained by an unbroken line of authorities, among which we cite *Shirk v. Board etc.*, 106 Ind. 573; *Randall v. Silverthorn*, 4 Pa. St. 173; *Zell v. Universalist Society*, 119 Pa. St. 390; 4 Am. St. Rep. 654; *Cannon v. Boyd*, 73 Pa. St. 179.

That the way as described in the complaint was appurtenant, and passed by a conveyance of the same, is established by the following, with many other cases: *Robinson v. Thrailkill*, 110 Ind. 117; *Parish v. Kaspere*, 109 Ind. 586; *John Hancock M. L. Ins. Co. v. Patterson*, 103 Ind. 582; 53 Am. Rep. 550; *Ross v. Thompson*, 78 Ind. 90; *Davidson v. Nicholson*, 59 Ind. 411; *Keiper v. Klein*, 51 Ind. 316; *Moore v. Crose*, 43 Ind. 30; *Sanxay v. Hunger*, 42 Ind. 44.

It is also claimed that if a way of necessity existed over the lands of the appellant, the selection or location of the way belonged to the appellant. The law is unquestionably as stated, but according to the allegations of the complaint, the right of selection had been exercised by those under whom the appellant claimed title. The controversy between the parties was not as to the location of the way, but it was a denial of the existence of any way over the appellant's lands. Whether a way of necessity when once located can be changed to another portion of the servient estate is not before us in this appeal, and we do not therefore pass upon the question.

The court did not err in overruling the demurrer to the complaint.

Judgment affirmed.

EASEMENT — RIGHT OF WAY OF NECESSITY — GRANTEE OF LAND, WHEN ENTITLED TO. — A right of way of necessity is upheld on the principle that the grant of a thing is presumed to convey whatever right the grantor had, and without which the grant would be useless to the grantee: *Whitehouse v. Cummings*, 83 Me. 91; 23 Am. St. Rep. 756, and note; *McTavish v. Carroll*, 7 Md. 352; 61 Am. Dec. 353, and note. For a discussion of the subject of easements by necessity, see extended note to *Mitchell v. Seipel*, 36 Am. Rep. 415, and *Pettingill v. Porter*, 85 Am. Dec. 675. An existing way is a part of the realty, and passes by a conveyance of the land: *De Rochemont v. Burlington etc. R. R.*, 64 N. H. 500; *O'Daniel v. O'Daniel*, 88 Ky. 185; *Dorman v. Bates etc. Co.*, 82 Me. 438; *Wolf v. Brass*, 72 Tex. 133. One who takes an estate upon which a servitude has been imposed, with knowledge of its existence, holds it subject to such servitude: *Fankboner v. Corder*, 127 Ind. 164.

JOSLYN v. STATE.

[123 INDIANA, 160.]

INDICTMENT — DUPLICITY. — An information which charges in a single count the larceny of two distinct articles of personal property belonging to two different persons, without alleging that the property of the two owners was stolen at the same time and by the same act, is bad for duplicity.

INFORMATION for larceny. The opinion states the case.

S. M. Hench, for the appellant.

A. G. Smith, attorney-general, and *J. M. Robinson*, prosecuting attorney, for the state.

ELLIOTT, J. The information charges, in one count, that "the appellant feloniously did steal, take, and carry away one cutter bar of the value of ten dollars, and two hundred pounds of iron of the value of five cents per pound, of the personal property of James Gunnison, and one cutter bar of the value of ten dollars, and two hundred pounds of iron of the value of five cents per pound, the personal property of James Parham."

If the count of the information from which we have quoted is double, it is bad for duplicity. The rule is well settled that duplicity is fatal upon a motion to quash: *Siebert v. State*, 95 Ind. 471, 475; *Stewart v. State*, 111 Ind. 554, 556; *Fahnestock v. State*, 102 Ind. 156; *State v. Weil*, 89 Ind. 286; *Knopf v. State*, 84 Ind. 316.

Whether the pleading is double or not depends upon whether stealing the property of two different persons is *prima facie* one offense, or is two distinct offenses. We do not here controvert the doctrine that there may be cases

where the larceny of the property belonging to different persons may constitute a single offense; as, for instance, where it is all in one bundle, or in one package, for it is unnecessary to do so, inasmuch as in such a case there is a single and indivisible act, and it may be a single crime: *State v. Nelson*, 29 Me. 329; 1 Hale P. C. 531; *Clem v. State*, 42 Ind. 420; 13 Am. Rep. 369; *Ben v. State*, 22 Ala. 9; 58 Am. Dec. 234. If the information alleged that the property of the two owners was stolen at the same time and by the same act, so that it could be affirmed that there was a single larceny, we should perhaps be able to sustain the information. But the difficulty that arises cannot be solved by assuming that there was a single act, unless as a matter of law it can be adjudged that the larceny of property belonging to different owners, committed on the same day, constitutes a single crime; for there are no facts alleged tending to show that there was one indivisible offense. As there is only a single count, we are required to decide whether the larceny of property belonging to two different persons can as matter of law be considered to constitute one offense; for no more than one offense can be properly charged in one count of an indictment or information, although different offenses may be charged in different counts.

It is well known that every larcenous taking is a trespass against the owner. An essential element of the crime of larceny is trespass, although the trespass may be constructive, and not actual. Assuming, as we must, that the element of trespass is essential to the crime of larceny, we must ascertain what the implication is, where it is charged that there was a trespass against two or more persons. It seems clear to us that the implication is, that the trespasses were separate and distinct. If Gunnison had sued the appellant for the trespass, and had alleged that the appellant carried away his, Gunnison's, property, and that of Parham also, we suppose it to be plain that Gunnison could not recover the value of Parham's property, for the implication would be, that there were distinct causes of action. If this is the implication, then the information is double. We can perceive no escape from this conclusion. We cannot infer, for the sake of upholding a conviction of a crime, that what would ordinarily be regarded as two distinct trespasses is in fact only one. The authorities require the conclusion we have suggested. In the case of *Phillips v. State*, 85 Tenn. 551, the goods belonged to dif-

ferent persons, but were taken on the same night from the same room, and it was held that there were two distinct offenses. In speaking of the trespass to the different owners, it was said: "The wrong to one of them was no wrong to the other; and if the wrong to each was not a complete crime within itself, there is no wrong at all, because two acts involving the distinct rights and property of different individuals cannot be coupled in order to constitute one offense against the law." Possibly the language used is a little too broad; but restricting it to due bounds, nevertheless, the principle declared decides the case against the state. Suppose, for the sake of illustration, that the appellant had been convicted of stealing Gunnison's property, and was subsequently indicted for stealing Parham's property, would the conviction be *prima facie* a bar to the second prosecution? To our minds it is clear that it would not be, although it is possible that if it appeared that the property of both owners was stolen in a single and indivisible act, the first conviction would bar further prosecution. If the first prosecution would not be a bar, — and we think it would not be, — it must be for the reason that *prima facie* there are two offenses.

Resuming our consideration of the authorities, we quote from the case of *Morton v. State*, 1 Lea, 498, the following: "Every larceny includes a trespass to the person or property of the owner of the thing stolen. A larceny of the property of O'Brien was no trespass to the person or property of Corbitt, and *vice versa*." In the case of *State v. Thurston*, 2 McMull. 382, it was held that taking cotton belonging to three persons constituted three distinct offenses. The doctrine is carried much further — possibly too far — in *Commonwealth v. Andrews*, 2 Mass. 409, for it was there held that the offenses were distinct, although there was a single act. But well-reasoned cases in California go to the same length: *People v. Alibez*, 49 Cal. 452; *People v. Wasson*, 65 Cal. 538; *People v. Yoakum*, 53 Cal. 566. The common-law rule as stated in *State v. Nelson*, 8 N. H. 163, is this: "If one steal at the same time the goods of A and also other goods of B, there are two distinct larcenies: 8 East, 521." Some of the cases say that the rule is, that "the plea of *autre fois acquit* or *convict* is sufficient, whenever the proof shows the second case to be the same transaction with the first": *Roberts v. State*, 14 Ga. 8; 58 Am. Dec. 528; *Holt v. State*, 38 Ga. 187. Without going into an examination of the decisions of other courts in detail, we cite,

as sustaining the doctrine that unless the transaction is indivisible and the same, the offenses are distinct, *Vaughan v. Commonwealth*, 2 Va. Cas. 273; *Teat v. State*, 53 Miss. 439; 24 Am. Rep. 708; *Burns v. People*, 1 Park. Cr. 182; *People v. Saunders*, 4 Park. Cr. 196; *Regina v. Morris*, 10 Cox C. C. 480.

It is difficult to reconcile the doctrine of our later cases with that asserted in *Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369, but it is not important that we should attempt to do so in this instance; nor is it necessary to determine which is the better doctrine, for, assuming that the doctrine of *Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369, is sound, it in no wise impeaches our conclusion; for it is there held that the crime must be the product of one and the same act, and conceding this, the information before us is bad.

In the case of *State v. Elder*, 65 Ind. 282, 32 Am. Rep. 69, it was said: "When the same facts constitute two or more offenses, wherein the lesser offense is not necessarily involved in the greater, and when the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act." Much to the same effect is the reasoning in *State v. Hattabough*, 66 Ind. 223, and *Siebert v. State*, 95 Ind. 471. See also *Davidson v. State*, 99 Ind. 366. We know that there are decisions hostile to the conclusion we here assert, but we are satisfied that our conclusion is right on principle, and sustained by the decided weight of authority.

It may not be amiss to say that we intimate no opinion as to what the rule should be upon a motion in arrest, for here the attack was made upon the information promptly, and the state had ample time and opportunity to cure the error.

Judgment reversed.

INDICTMENT — DUPLICITY. — An indictment is open to the objection of duplicity where two or more distinct offenses are charged in one count: *Reagan v. State*, 28 Tex. App. 227; 19 Am. St. Rep. 833, and note; note to *State v. Shores*, 13 Am. St. Rep. 886.

Joinder in one indictment of two felonies, which differ neither in character nor in the punishment attached thereto, is not a good ground for quashing the indictment: *Sarah v. State*, 28 Miss. 267; 61 Am. Dec. 544, and note; *Hampton v. State*, 8 Humph. 69; 47 Am. Dec. 599, and note; *State v. Blakesley*, 43 Kan. 250.

RHODES v. STATE.

[128 INDIANA, 189.]

ABORTION, INDICTMENT FOR, WHEN SUFFICIENT. — An indictment for criminal abortion, which charges that an instrument was feloniously introduced into the womb of a pregnant woman with the intent to produce a miscarriage, such operation not being necessary to save her life, is sufficient, without describing the nature of the wound it produced or the character of the disease that resulted therefrom. Such an indictment is not bad because it shows both miscarriage and death.

INDICTMENT NOT BAD FOR DUPLICITY WHEN. — An indictment is not bad for duplicity because it charges an accessory before the fact as a principal.

DECLARATIONS AND EXCLAMATIONS MADE IN LAST ILLNESS ADMISSIBLE IN EVIDENCE WHEN. — Upon the trial of a prisoner indicted for criminal abortion, the declarations and exclamations indicative of pain and suffering, made by the woman in her last illness, and not referring to the past, are competent evidence.

STATE CANNOT CONTRADICT ITS OWN WITNESS WHEN. — Where the state is neither surprised nor prejudiced by the testimony of a witness called by it, it cannot contradict him by introducing evidence of contradictory statements made by him out of court.

EVIDENCE THAT VICTIM OF ABORTION WAS BURIED BY COUNTY INADMISSIBLE. — In a prosecution for criminal abortion, evidence showing that the woman upon whom the abortion was committed was buried at the expense of the county is not competent.

REASONABLE DOUBT, INSTRUCTIONS CONCERNING, WHERE EVIDENCE PURELY CIRCUMSTANTIAL. — In a case where the evidence as to the defendant's guilt is purely circumstantial, the evidence must lead to the conclusion so clearly and strongly as to exclude every reasonable hypothesis consistent with innocence. In a case of that kind an instruction in these words is erroneous: "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty." It is not enough that the evidence necessarily leads the mind to a conclusion, for it must be such as to exclude a reasonable doubt. Men may feel that a conclusion is necessarily required, and yet not feel assured beyond a reasonable doubt that it is a correct conclusion.

JUROR WITH DEFECTIVE EYESIGHT NOT COMPETENT. — A person whose eyesight is so defective that he cannot see the expressions of witnesses testifying nor observe their deportment or demeanor is not competent to serve as a juror, even in cases where the testimony consists entirely of the statements of the witnesses, much less in a case where various articles are placed before the jury and used as illustrative of the testimony, none of which are seen by him. And the defendant is not negligent in such a case, where his counsel fully examines the juror, and such juror answers the questions asked him in such a way as to disarm suspicion of his disqualification, and there was nothing to indicate that his eyesight was defective.

INDICTMENT for abortion.

W. P. Rhodes, R. P. De Hart, A. L. Kumler, and T. F. Gaylord, for the appellant.

A. G. Smith, attorney-general, and G. P. Haywood, prosecuting attorney, for the state.

ELLIOTT, J. The indictment upon which the appellant was convicted charges him with having feloniously introduced an instrument into the womb of a pregnant woman with the intent to produce a miscarriage.

The appellant's counsel insist that the court erred in overruling the motion to quash the indictment, and allege several objections, but all of them are without substantial merit. It is said that the indictment is bad because it does not show that the woman miscarried or died, but this point is not supported by the record, for it does appear that there was a miscarriage and death. Good pleading does not require any such particularity as counsel insist upon. It is sufficient, in such a case as this, to charge that an instrument was feloniously introduced into the womb of a pregnant woman, without showing what kind of a wound it produced or what disease it caused. Where the felonious use of an instrument is shown, and it appears, as it does here, that the operation was not necessary to save the woman's life, it is not incumbent upon the state to go further, and describe the nature of the wound or the character of the disease which resulted.

The objection that the indictment is bad because it shows both miscarriage and death has not even the poor merit of plausibility.

The indictment is not bad for duplicity. An accessory before the fact may be charged as a principal.

The other questions on the case arise on the ruling denying the motion for a new trial.

Complaint is made of the ruling of the court in admitting the declarations and exclamations of the woman upon whom the abortion was committed, but the complaint is groundless. The declarations and exclamations were indicative of pain and suffering, were made by the woman in her last illness, and they did not refer to the past. They were clearly competent: *Board etc. v. Leggett*, 115 Ind. 544, and authorities cited.

Dr. Smith was called as a witness by the state, and, so far as we can discover, gave no testimony different from that which the state required and expected from him. There is

nothing in the record indicating that the state was surprised by his testimony, or that it was regarded as prejudicial. It is true that the witness said, in a general way, that the woman was suffering from a malarial fever, but he was not, when originally called, asked by the state as to whether there were symptoms indicating an attempt to produce an abortion. The testimony of the witness was strongly favorable to the state in one particular, inasmuch as it tended to show the appellant's intimacy with the woman upon whom the instrument was used. After the witness left the stand, and near the close of the case, he was recalled, and the counsel for the state addressed to him this question: "Did not Mrs. Chapman ask you, 'What in the world is the matter with her?' and did you not reply, 'I don't know; whatever she has done, or has been done, or whatever she has taken, is the cause of the sickness, and will be the cause of her death'?" Subsequently, Mrs. Chapman was called, and she testified that Dr. Smith was asked by her the question embodied in the interrogatory propounded by the state, and that he answered it as stated in the interrogatory. It is no doubt true that the state may, in the proper case, contradict its witnesses by evidence of contradictory statements made out of court: *Conway v. State*, 118 Ind. 482. Justly limited and rightfully applied, the statutory rule is a wise and salutary one; but if not properly limited and employed, it may be very unjust and mischievous. If a party may call a witness, elicit from him only what is expected, and what is not prejudicial, and then prove statements made out of court by the witness, great harm may be done the adverse party. It happens, as the decisions and the books show, that witnesses make careless or reckless statements out of court which they will not make under oath, and such statements ought not to be brought out by the party who produces the witness, unless the testimony of the witness is prejudicial to him. It is, indeed, doubtful whether they can be brought out where there was no obligation on the party to call the witness, and the testimony was what the party knew, or had reason to believe, the witness would give. It is true that evidence of such statements is theoretically evidence affecting credibility only, and is not evidence of the facts embraced in the contradictory statements; but, nevertheless, evidence of contradictory statements does often influence the jury. The limitation placed upon the statutory rule by the decisions is a wise one. That limitation is this: Where the wit-

ness gives no prejudicial testimony upon the point to which the contradictory statements relate, evidence of statements made out of court is not competent. Where the party calling the witness is surprised by his testimony, or where it is prejudicial, then contradictory statements as to the point upon which the evidence is prejudicial is competent; otherwise not: *Hull v. State*, 93 Ind. 128; *Conway v. State*, 118 Ind. 482, and cases cited; *Miller v. Cook*, 124 Ind. 101. In the case last cited, it was rightly held that the contradictory statements must relate to the point upon which the evidence is prejudicial, and so we hold here. While we incline to the opinion that the contradictory statements were improperly admitted in evidence, still we should be unwilling to reverse the judgment for the error, if it was one, for the reason that we think that the erroneous ruling, conceding it to be such, could not possibly have affected the result.

We are unable to perceive upon what ground the ruling of the court permitting the state to show that the woman upon whom the abortion was produced was buried at the expense of the county can be sustained. The evidence was not competent; but for the error in admitting it, if there were no other errors in the record, we should not be inclined to reverse the judgment.

The evidence that some one did use means to produce an abortion upon the woman named in the indictment is sufficiently clear and satisfactory to warrant the inference of guilt. There are circumstances tending to prove that the accused either used the instrument himself, or caused some other person to use it. The criminating circumstances are, we repeat, such as warrant the inference of guilt, but they do not absolutely require it.

The evidence upon the material point as to who actually used, or caused to be used, the instrument by which the miscarriage was produced was wholly and purely circumstantial. The case is not, therefore, one in which we can say that a mistake in defining a reasonable doubt, or an error in charging the law upon the subject of a reasonable doubt, will not compel a reversal of the judgment. If the case were one of direct and satisfactory evidence, or one where the circumstantial evidence was so convincing and clear that we could say without hesitation that the verdict was right, possibly we might affirm the judgment of conviction under the rule laid down in *Heyl v. State*, 109 Ind. 589, even though the

instructions are not entirely satisfactory. We are, however, required to decide whether the instructions given upon the subject of reasonable doubt are correct, as applied to a case where the evidence of guilt is purely circumstantial.

The settled rule is, that instructions upon a single subject must be considered together, and not in fragmentary parts; and if, thus considered, they correctly declare the law, they will not be overthrown, even though detached or isolated parts may not be accurate or clear. If, therefore, the series of instructions upon the subject of reasonable doubt, considered as a whole, are not erroneous, the attack of appellant's counsel must fail. In obedience to the settled rule that all of the instructions must be considered, we group those instructions, and consider them as an entirety. They read thus: "3. The defendant is presumed to be innocent; and before he can be convicted, the state must prove him guilty beyond a reasonable doubt. 4. A reasonable doubt arises when the evidence is not sufficient to satisfy the minds of a jury to a moral or reasonable certainty of the defendant's guilt. A reasonable doubt is not an unreasonable doubt, — it is a doubt for which a reason can be given. It is not a mere surmise or guess that the defendant may not be guilty of what he is charged. 5. The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty."

No one of these instructions fully informs the jury of the weight of evidence required to produce the moral certainty which is essential to a conviction of a felony. No one of them gives the test by which to measure the evidence; at all events, no such test is given as is required by the decisions in the cases of *Bradley v. State*, 31 Ind. 492, 505; *Jarrell v. State*, 58 Ind. 293, 297; *Knight v. State*, 70 Ind. 375; *Garfield v. State*, 74 Ind. 60; *Behymer v. State*, 95 Ind. 140; *Brown v. State*, 105 Ind. 385; *Farley v. State*, 127 Ind. 419. But we could possibly sustain the instructions, notwithstanding this defect or omission, inasmuch as no specific instructions were asked by the appellant, if there were no affirmative errors in them.

The drift of the entire series upon the essential point — what constitutes a reasonable doubt — is unfavorable to the accused. The jury are repeatedly told what does not constitute a rea-

sonable doubt, but they are not informed what does constitute such a doubt. If, therefore, there are statements directly against the accused, they must be regarded as prejudicial, and if erroneous, we must reverse the judgment. The fifth instruction declares that "if all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is bare possibility that he may be innocent, you should find him guilty." This is not the law. It is not enough that the evidence necessarily leads the mind to a conclusion, for it must be such as to exclude a reasonable doubt. Men may feel that a conclusion is necessarily required, and yet not feel assured beyond a reasonable doubt that it is a correct conclusion. Life and liberty cannot be taken where evidence does no more than necessarily lead to a given conclusion. Jurors must act freely and without compulsion in deciding against life or liberty, for so say the decisions upon the subject. The evidence must lead to the conclusion so clearly and strongly in a case like this, where the evidence is purely circumstantial, as to exclude every reasonable hypothesis consistent with innocence. It is, however, not necessary that the evidence should produce absolute certainty in the minds of the jurors, or that it should dissipate mere conjectures and speculative doubts: *Kennedy v. State*, 107 Ind. 144; 57 Am. Rep. 99. The law as declared by an eminent author, and approved in *Sumner v. State*, 5 Blackf. 579, 36 Am. Dec. 561, is this: "On the one hand, absolute, metaphysical, and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty, to the exclusion of every reasonable doubt." Professor Greenleaf says: "Neither a preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt": 3 Greenl. Ev., 14th ed., sec. 29. It is often true that a preponderance of the evidence will necessarily lead the mind to a conclusion, but where human life or liberty is at stake, reasonable doubt must be removed, and the removal of reasonable doubt is not always essential to a necessary conclusion. A necessary conclusion may logically appear to result, and yet all reasonable doubt be not removed. We do not hold the instruction erroneous because of its statement as to the effect of the bare possibility of innocence, but because it directs the jury that "if the facts established

necessarily lead the mind to the conclusion " that the accused is guilty, they must convict him.

It is very doubtful whether the statement that the doubt " must be one for which a reason can be given " is correct, but as to that we give no opinion: *Carr v. State*, 23 Neb. 749; *Cowan v. State*, 22 Neb. 519.

One of the jurors made affidavit that his eyesight was so defective that he was unable " to distinguish one from another of the faces of the witnesses, that he did not see the face of the defendant, and that he did not see the expressions of the witnesses testifying nor observe their deportment or demeanor." We think that the juror was not competent to sit even in cases where the testimony consists entirely of the statements of the witnesses. Again and again have verdicts been allowed to stand because of the effect declared to be exerted by the demeanor and deportment of witnesses, and surely no one who cannot see the expression of faces, nor observe deportment and demeanor, can justly weigh testimony. But in this instance various articles were placed before the jury and used as illustrative of the testimony, none of which was seen by the juror. Clearly his unfortunate infirmity incapacitated him from properly observing the evidence.

The accused was not negligent, for he, by his counsel, fully examined the jurors as to their qualifications. The answers of the juror of whom we are speaking were such as to disarm suspicion of his disqualification, and there was nothing to indicate that his eyesight was defective.

The state insists that a circumstance which occurred during the trial ought to have warned the defendant's counsel of the juror's infirmity. But we think otherwise. The circumstance was not such as to make it the duty of counsel to note it, and ask for another jury. Counsel, by sworn statements, declare that they did not observe it, and we see nothing in the occurrence to justify the inference that they did observe the juror's infirmity. Nor are they contradicted, for the utmost that can be said of the counter-affidavits is, that the affiants believed that counsel did note what occurred.

The judgment is reversed, with instructions to sustain the appellant's motion for a new trial.

EVIDENCE — DECLARATIONS AS TO CAUSE OF ILLNESS, WHEN ADMISSIBLE. — The declarations of a woman in her last illness, as to its cause, are admissible in evidence: *Pullman etc. Co. v. Smith*, 79 Tex. 468; 23 Am. St. Rep. 356. Dying declarations of the victim of an abortion are admissible on a prosecution for death produced thereby: *Montgomery v. State*, 80 Ind. 338; 41 Am. Rep. 815; *contra*, see *State v. Harper*, 35 Ohio St. 78; 35 Am. Rep. 596. Exclamations and expressions of bodily pain in an action for injury are admissible in evidence: *Texas etc. R'y Co. v. Barron*, 78 Tex. 421; *Birmingham etc. R'y Co. v. Hale*, 90 Ala. 8.

WITNESSES. — A witness cannot be impeached by the party calling him: *Blackwell v. Wright*, 27 Neb. 269; 20 Am. St. Rep. 662, and note. Unless a witness has deceived the party calling him, that party cannot impeach him. This is the rule in criminal prosecutions: *Dixon v. State*, 86 Ga. 754. In *Thompson v. State*, 29 Tex. App. 208, the rule was declared that a witness may be impeached by the party calling him by showing that he made contradictory statements.

CIRCUMSTANTIAL EVIDENCE — REASONABLE DOUBT. — Each necessary link in the chain of evidence must be proved beyond reasonable doubt to sustain a verdict of guilty in a criminal prosecution resting upon circumstantial evidence: *People v. Aiken*, 66 Mich. 460; 11 Am. St. Rep. 512. See case of *Gannon v. People*, 127 Ill. 507; 11 Am. St. Rep. 147, and note. A party charged with crime is entitled to acquittal unless proved guilty beyond a reasonable doubt: *Williams v. State*, 85 Ga. 535; *Owen v. State*, 89 Tenn. 698. The evidence, to justify a conviction, need not exclude every hypothesis than that of guilt; such an hypothesis must be reasonable: *Little v. State*, 89 Ala. 99.

LOUISVILLE, NEW ALBANY, AND CHICAGO RAILWAY COMPANY v. WOLFE.

[128 INDIANA, 347.]

MISCONDUCT OF RAILWAY PASSENGER UNDER PROVOCATION NO EXCUSE FOR EXPELLING HIM WHEN. — A railway company cannot justify the act of its conductor in expelling a passenger who has paid his fare, on account of his having, in the heat of passion, when falsely charged with the failure to pay, used improper, profane, and vulgar language in the presence and hearing of lady passengers.

PASSENGER WRONGFULLY EJECTED FROM RAILWAY TRAIN MAY RECOVER FOR INJURIES RECEIVED IN MAKING REASONABLE RESISTANCE. — A railway passenger who is lawfully in a car, having paid his fare, has the right to make reasonable resistance to an attempt to eject him; and if he is unlawfully ejected therefrom, the company will be liable for the damages occasioned to his person by his making reasonable resistance to prevent his removal.

EXEMPLARY DAMAGES ALLOWABLE WHEN MALICE AND OPPRESSION WEIGH IN CONTROVERSY. — Exemplary damages may be assessed when malice and oppression weigh in the controversy, and the offense is not punishable by the criminal law.

ACTION to recover damages for wrongful expulsion from a railway train. The opinion states the case.

C. L. Jewett, H. E. Jewett, E. C. Field, D. J. Wile, and S. O. Pickens, for the appellant.

A. Dowling, for the appellee.

OLDS, C. J. This is an action by the appellee against the appellant for being wrongfully expelled from the appellant's train by its servants, with force and violence, under humiliating circumstances. Issues were joined on the complaint by a general denial and answers in justification, one alleging the non-payment of fare, and the other non-payment of fare and the use of profane and indecent language, and that he was guilty of disorderly conduct. The appellee replied in denial to the answers in justification. There was a trial by jury, and a verdict in favor of the appellee for fifteen hundred dollars damages. The jury also returned answers to special interrogatories. Appellant moved for judgment on the interrogatories and answers, also for a new trial, and to modify the judgment, all of which motions were overruled, and judgment rendered on the verdict.

Appellant's counsel discuss three propositions: 1. That appellee, by his conduct and language, forfeited his right to be carried as a passenger, and appellant had the lawful right to eject him from the train; 2. That the damages are excessive; and 3. That the court erred in the instruction given in relation to damages.

The jury, by their answers to interrogatories, find that appellee, on August 29, 1887, purchased a ticket at New Albany for passage on appellant's train from New Albany to Mitchell, Indiana, and on said day he took passage on appellant's train for Mitchell, and on demand of the conductor surrendered his ticket; that the conductor demanded fare or a ticket twice before stopping the train to put appellee off, and the train was stopped, not at a regular station or stopping-place, to put him off; that the train was stopped before any effort was made to eject appellee, and before he was put off the train he said to the conductor: "If you say I did not give you a ticket, you are a God-damned lying son of a bitch"; that the words were spoken in a loud voice, and there were ladies in the car at the time; that when the train-men undertook to put the appellee off the train he resisted and struggled, and attempted to hold on to the seats in the car, and while so resisting he was injured about the arms and hands, and this was all the physical injuries he received.

It is insisted that these facts entitled the appellant to a judgment, notwithstanding the general verdict, on the theory that the appellee, by the use of the profane and improper language in a loud tone in the presence of the lady passengers, forfeited his right to be carried as a passenger, and the conductor had the right to stop the train and put him off. It is assumed in the argument that this finding of facts shows the appellee to have used this improper language before the train was stopped for the purpose of putting him off, but this assumption is not warranted by the finding. The finding is that he used this language "just before he was put off of defendant's train."

We do not think it presents the proposition discussed by counsel, viz., that if a passenger delivers to a conductor a ticket, or pays his fare, and afterwards the conductor calls upon him to again pay his fare, and disputes the first payment, and a dispute arises in which the conductor demands fare and the passenger refuses to pay it on the ground that he has once paid, but in his refusal he becomes boisterous, and is guilty of unbecoming conduct, or the use of vulgar, obscene, and profane language, he forfeits his right to be carried farther, notwithstanding he has paid his fare, and the conductor may stop the train and expel him without liability. For aught that appears in the finding in this case, the appellee may have conducted himself in a perfectly civil and gentlemanly manner until the train was stopped, and the employees of the appellant had taken hold of him and a struggle ensued, and the appellee taken from his seat, and that it was just as he was about to be finally ejected from the car when he used the language. If such were the facts, — and they may have been for aught that appears from the finding, — it would present a very different case than if the language was used in the first instance; for in such a case as we have put, it would be clear that the language used had nothing to do with the ejection from the train. It would be clearly apparent, under such a state of facts, that he would have been ejected without regard to the use of the language. But conceding that the language was used before the train was stopped, it does not appear that he was ejected on account of the vile language used. It is undoubtedly true that a passenger, by a breach of decorum, either by his acts or his language, may forfeit his right to be carried as a passenger, and may be expelled from the train, notwithstand-

ing he has paid his fare; and this may be true even if he be led to such breach by reason of an insult offered him by an employee of the company.

A wanton insult or false accusation often causes a sudden outburst of temper and the use of language which one in an instant after regrets, and feels the mortification more keenly than do those in whose presence it is uttered. One who utters language in a heat of passion caused by a sudden and wanton insult and unexpected charge against his truthfulness and honesty must be dealt with more leniently than if the language is used deliberately, without provocation, or after reasonable time for second thought and opportunity to bridle and control his passion. The fact that a false and slanderous charge is made in the heat of passion may be proven in mitigation of damages. If a conductor, after having received a ticket for fare from a passenger, should return to him and falsely deny having collected his fare or received a ticket, and demand pay again, and it is refused, and the conductor should abandon any further effort to collect again the fare, or refrain from making any threats of putting him off the train, and the passenger, after having reasonable time to control himself, should persist in the use of profane or indecent language, to the annoyance of other passengers, he would no doubt violate his right to be carried, at least if the unearned fare was tendered back to him. But the company cannot justify the act of the conductor in expelling a passenger who has paid his fare, on account of his having, in the heat of passion, when he was falsely charged with the failure to pay, used improper language, such as was used in this case in response to such false charge, even though it was heard by other passengers. The wrong committed by the passenger was provoked by the conductor. It does not lie in the mouth of the appellant to say: "True, you paid your fare. You had the right to be carried. But when the conductor falsely charged you, in the presence of the other passengers, with not having paid your fare, and demanded that you again pay fare, or he would stop the train and put you off, you became angry; you used improper language to the conductor in the presence of lady passengers." If the theory contended for by the appellant be the true one, then it would be an inducement for the employees of railroad companies, under such circumstances, to wantonly and purposely address the passenger in such a manner as to provoke

him to the use of bad language or bad conduct, as affording an excuse, in case he refused to pay a second time, to eject him from the train. The damages sued for accrued on account of an injury on the part of the employee of the appellant to the appellee. The offense committed by the appellee is against the other passengers. He was provoked to the commission of it by the act of the employee of the appellant in falsely accusing him, in the presence of the other passengers, of not having paid his fare. Certainly the company ought not to defend against the unlawful act of their agent on account of such unlawful act having provoked a breach of decorum, or even a breach of the peace, on the part of the appellee.

It is true, the language used was unjustifiable, and was an insult to those in whose presence it was uttered, but it is evidently the fact that this breach of decorum was provoked and caused by an insult offered by the conductor to the appellee in the presence of the passengers, and we see no just reason why, under such circumstances, it should operate as a defense to appellee's right of action, and bar him from a recovery.

It is next contended that the verdict is excessive, for the reason that the jury found that all the physical injuries inflicted were caused by the appellee resisting, and that he cannot recover for an injury caused by his resistance. There is nothing to show that the jury did include any damages for the injury occurring by reason of appellee's resistance, but the appellee being lawfully in the car, and having paid his fare, he had the right to be carried, and had the right to make reasonable resistance, as he did, by holding on to the seats, and he was forced loose and taken from the car; and for such damages as he sustained on account of such removal from the car the appellant is liable: *English v. Delaware etc. Canal Co.*, 66 N. Y. 454; 23 Am. Rep. 69; *Southern Kansas etc. R'y Co. v. Rice*, 38 Kan. 398; 5 Am. St. Rep. 766; *Lake Erie etc. R'y Co. v. Acres*, 108 Ind. 548; *Chicago etc. R. R. Co. v. Holdridge*, 118 Ind. 281.

Some objection is made to the giving of the seventh instruction, and the refusal to give instruction 7 asked by appellant. We have examined these instructions, and think there is no available error in the instruction given. It is evident the jury was not misled by any technical error in the language used, even if it is erroneous. The instruction relates to the right to give exemplary damages, and there was

some evidence which, if true, authorized the assessment of exemplary damages: *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116; 10 Am. Rep. 103. Where the offense is not punishable by the criminal law, and malice or oppression weigh in the controversy, exemplary or vindictive damages may be assessed. What we have said as to the other alleged errors disposes of the question presented by the instruction refused.

It is further contended that a new trial should have been granted, by reason of accident and surprise on account of an absent witness. There is no diligence shown,—no application for a continuance,—and the evidence is merely cumulative.

There is no error in the record.

Judgment affirmed, at costs of appellant.

RAILROADS — MISCONDUCT OF PASSENGER NO EXCUSE FOR WANTONNESS. — Though a passenger renders himself liable to expulsion from a railroad car on account of his disorderly conduct, he may recover punitive damages where the defendant's servants acted in a wanton, high-handed, and outrageous manner: *Philadelphia etc. R. R. Co. v. Larkin*, 47 Md. 155; 28 Am. Rep. 442, and note; extended note to *Chicago etc. R. R. Co. v. Parks*, 68 Am. Dec. 570-573.

RAILROADS — RIGHT OF PASSENGER TO RESIST EXPULSION. — Where a passenger on a railroad car has paid his fare, he has a right to resist an attempt of the train-men to eject him, and if he is injured in making such resistance, he may recover therefor: *English v. Delaware etc. Canal Co.*, 66 N. Y. 454; 23 Am. Rep. 69; *Higgins v. Watervliet etc. R. R. Co.*, 46 N. Y. 23; 7 Am. Rep. 293, and note; *Illinois etc. R. R. Co. v. Whittemore*, 43 Ill. 420; 12 Am. Dec. 138, and note; *Jardine v. Cornell*, 50 N. J. L. 485.

RAILROADS — EXPULSION OF PASSENGER — PUNITIVE DAMAGES. — Punitive damages may be awarded for the wrongful expulsion of a passenger from a train: *Georgia etc. Co. v. Esckew*, 86 Ga. 641; 22 Am. St. Rep. 490, and note; *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364; 92 Am. Dec. 133, and note; *Hoffman v. Northern Pac. R. R. Co.*, 45 Minn. 53. Punitive damages should not be awarded unless it is shown that in expelling a passenger the defendant's servants acted in a wanton and reckless manner: *Patry v. Chicago etc. R'y Co.*, 77 Wis. 218.

LANE v. BOICOURT.

[128 INDIANA, 420.]

PLAINTIFF MAY WAIVE TORT AND SUE ON CONTRACT IN ACTION AGAINST PHYSICIAN FOR MALPRACTICE. — In an action against a physician for malpractice, the plaintiff may waive the tort and sue upon contract.

COMPLAINT IN CONTRACT NOT IN TORT WHEN. — A complaint in an action against a physician for malpractice, in which the plaintiff alleges that he employed the defendant to give professional attention to his wife in child-birth, promising him compensation; that the defendant contracted with the plaintiff to render the required services; and that, as a breach of said contract, the defendant failed to give the plaintiff's wife the proper attention, — is a complaint in contract, and not in tort.

EVIDENCE — PHYSICIAN RELIEVED FROM OBLIGATION OF SECRECY AS TO OCCURRENCE IN SICK-ROOM WHEN. — Where, in an action against a physician for malpractice, the plaintiff testifies to an occurrence in the sick-room, the physician himself, or one present as a consulting physician, may testify as to the occurrence. The plaintiff, by opening the matter to investigation, removes the obligation of secrecy on the defendant's part.

ACTION for malpractice. The opinion states the case.

T. J. Terhune and B. S. Higgins, for the appellant.

H. C. Wills and O. P. Mahan, for the appellee.

ELLIOTT, J. The material facts stated in the appellee's complaint are these: The appellant was engaged in the practice of medicine and surgery for fifteen years prior to the seventeenth day of April, 1883, and represented himself to be skilled as a physician, surgeon, and *accoucheur*. On the day named, the appellant was employed by the appellee to give professional care and attention to his wife, for which compensation was to be paid. The appellee's wife was brought to bed in child-birth, and the appellant was employed to give her such professional care as she required to safely deliver the child, and also to bestow upon her such medical and surgical attention as might be needful until her restoration to health. The appellant failed to give his patient the proper support or attention during parturition, but through his efforts caused the period of labor to be shortened, resulting in a laceration and rupture of the muscles connected with the genital organs. The appellant's duty was to at once bring the ruptured parts together, and to take measures to cause them to reunite, but this duty he failed to perform, and negligently suffered five days to elapse before attempting to bring the parts together. When he did make the attempt, he did

his work so negligently and unskillfully as to cause his patient great injury.

The outline we have given is sufficient to indicate the general scope of the complaint, but in order to determine the question which the appellant's counsel present, it is necessary to refer specifically to some of the allegations of the pleading. The question which counsel present is, whether the complaint is in contract or in tort, and this question must, of course, be determined from the allegations of the pleading. It is proper to preface our analysis of the complaint by saying that a plaintiff may elect to sue in tort or in contract. It is probably true that some of the expressions contained in the prevailing opinion in *Boor v. Lowrey*, 103 Ind. 468, 53 Am. Rep. 519, indicate a different doctrine, but the limitation placed upon that decision when the case was in this court for the second time authorizes the conclusion that it was not adjudged on the first appeal that a plaintiff may not elect to sue in contract, and thus waive the tort: *Hess v. Lowrey*, 122 Ind. 225; 17 Am. St. Rep. 355. The later decisions, as well as the earlier, very clearly assert that the tort may be waived, and an action brought upon the contract: *De Hart v. Haun*, 126 Ind. 378; *Goble v. Dillon*, 86 Ind. 327; 44 Am. Rep. 408; *Hoopingarner v. Levy*, 77 Ind. 455; *Burns v. Barenfield*, 84 Ind. 43; *Coon v. Vaughn*, 64 Ind. 89; *Staley v. Jameson*, 46 Ind. 159; 15 Am. Rep. 285. The decisions elsewhere fully recognize the rule that the action may be maintained upon the contract of the surgeon: *Gladwell v. Steggall*, 5 Bing. N. C. 733; *Pippin v. Sheppard*, 11 Price, 400. In *Nelson v. Harrington*, 72 Wis. 591, 7 Am. St. Rep. 900, it is conceded that an action will lie on the contract, but it was held that the allegations in the complaint before the court respecting the contract were mere matters of inducement.

Assuming that an action will lie upon a contract where facts are properly pleaded, we shall briefly give the result of our analysis of the appellee's complaint. It states that the appellee employed the appellant, and promised him compensation, and this, according to the English rule, is a controlling element. It avers, although very loosely, that the appellant contracted with the appellee to render the required services. It also contains this statement, "and the plaintiff alleges, as a breach of said contract, that the defendant failed to give the plaintiff's wife the proper attention." In our opinion, the complaint is in contract, and not in tort, for the aver-

ments referred to show that the pleader relied upon the agreement. The complaint can be much improved by amendment, but, as the question comes to us, we hold it sufficient as a complaint upon a contract, although we think a motion to make more specific would compel the plaintiff to amend it. We have decided the question stated because it may hereafter arise, not because it is essential to a decision of the case now before us. The complaint unquestionably states a cause of action, whether it be construed as declaring in contract or in tort, and if it does, the demurrer cannot prevail against it. The appellant's counsel hint, rather than assert, that a question of the statute of limitations is involved, but there is no such question in the record.

We come now to a question presented by the ruling denying a new trial. The appellee, his wife, and his wife's mother testified as to all that was done by the appellant at the time the surgical operation which caused the injury to the appellee's wife was performed. The appellant also testified, without objection, to what occurred at that time. He then called Dr. Williamson, who was in attendance as a consulting surgeon, but the trial court refused to permit him to testify to any matter that occurred at the time the operation was performed by the appellant. In our judgment, this was error.

The testimony given by the witnesses of the appellee broke the seal of privacy, and gave publicity to the whole matter. The patient waived the statutory rule. The course pursued laid the occurrence open to investigation. Nothing was privileged, since all was published. The statute was not meant to apply to such a case as this, nor is it within the letter or the spirit of the law. If a patient makes public in a court of justice the occurrences of the sick-room for the purpose of obtaining a judgment for damages against his physician, he cannot shut out the physician himself, nor any other who was present at the time covered by the testimony. When the patient voluntarily publishes the occurrence, he cannot be heard to assert that the confidence which the statute was intended to maintain inviolate continues to exist. By his voluntary act he breaks down the barriers, and the professional duty of secrecy ceases. It would be monstrous if the patient himself might detail all that occurred, and yet compel the physician to remain silent. The principle is the same whether the physician called is a consulting physician, or is the defendant. The opening of the matter to investigation removed

the obligation of secrecy as to all, not merely as to one. When the obligation to silence is broken, it is broken for the defendant as well as for the plaintiff. As to all witnesses of the transaction, it is fully opened to investigation, if opened at all, by the party having a right to keep it closed. A patient cannot elect what witnesses shall be heard, and what shall not; for if once investigation legitimately begins, it continues to the end. A patient may enforce secrecy if he chooses; but where he himself removes the obligation, he cannot avail himself of the statute to exclude witnesses to the occurrence. The case of *Hope v. Troy etc. R. R. Co.*, 40 Hun, 438, is not in point. In that case the physicians were called at different times; here there was one time and one occurrence, and that occurrence was given full publicity by the patient. It is only the secrets of the sick-room or of the consultation, we may say in conclusion, that the physician is forbidden to reveal; and what is made public by pleadings and by evidence in a court of justice can by no possibility be privileged to benefit the party who thus gives it such wide publicity.

Judgment reversed.

PHYSICIANS AND SURGEONS—ACTIONS AGAINST, FOR MALPRACTICE.—An action is one sounding in tort, and not upon contract, when the complaint alleges, in an action against a physician, that he was negligent in making a proper diagnosis of a case, and in failing to prescribe the proper remedies therefor, although there was an implied contract that the defendant treat the plaintiff in a skillful and proper manner: *Nelson v. Harrington*, 72 Wis. 591; 7 Am. St. Rep. 900; *De Hart v. Haun*, 126 Ind. 378. See extended note to *Webster v. Drinkwater*, 17 Am. Dec. 242–247, where the subject of waiving tort and suing on contract is discussed.

CITIZENS' STREET RAILWAY COMPANY v. ROBBINS.

[128 INDIANA, 449.]

CORPORATE STOCK IS PERSONAL PROPERTY.—Shares of stock in a corporation owned by a decedent at the time of his death are personal property, and upon his death descend to his heirs at law, subject to the right of his administrator to subject the same to sale in the manner prescribed by the laws of the state.

SALES OF PERSONAL PROPERTY OF DECEDENT MUST BE MADE IN MANNER PRESCRIBED BY STATUTE.—The common-law right of the administrator to sell and dispose of personal property of his intestate does not exist in Indiana. Sales of such property must be made in the manner prescribed by its statutes upon the subject. In the absence of an order from the proper court, the sale must be public, and where the sale is private,

under the order of the court, it must be made in substantial compliance with the order.

TITLE TO PROPERTY SOLD BY ADMINISTRATOR UNDER ORDER OF COURT PASSES WHEN. — In cases of private sales by administrators, where the order of the court does not require a confirmation, if the sale is made in substantial compliance with the order of the court, the title passes to the purchaser upon his compliance with the terms of the sale.

ADMINISTRATOR'S SALE WITHOUT COMPLIANCE WITH ORDER OF SALE VOID. — Where an administratrix obtains an order to sell shares of stock belonging to her intestate at private sale on good security, but she sells them upon the individual note of the purchaser without any security, and on a credit of ten years, when she had no power to give a credit exceeding twelve months, such sale is void and vests no title.

CORPORATION LIABLE FOR ILLEGAL TRANSFER OF SHARES OF ITS STOCK WHEN. — Where an administratrix sells shares of stock belonging to her intestate without complying with the order of sale, the corporation whose shares of stock are thus sold will be liable to the estate of such intestate for any loss occasioned to it by reason of such corporation having transferred such shares on its books to the purchaser without ascertaining that the administratrix had complied with the requirements of the order of sale, the corporation having had notice that the stock belonged to the estate of the intestate, and that an order of sale had been made. Before such corporation could lawfully cancel the stock held by the intestate's estate, it was bound to know, not only that an order of sale had been entered by the court, but that a sale had also been made pursuant to the terms of that order.

PURCHASER IN GOOD FAITH NOT LIABLE TO DECEDENT'S ESTATE WHEN. — Where an administratrix sells shares of stock belonging to her intestate's estate without complying with the order of sale, and the corporation whose shares of stock are thus sold illegally transfers such shares of stock to the purchaser, one who in good faith, and without any knowledge of the illegality in the surrender and cancellation of the original shares of stock, purchases from said purchaser the new certificates of stock is not liable to the estate of said intestate, but the remedy of such estate is against the corporation.

STATEMENT SET OUT IN COMPLAINT ADMISSIBLE IN EVIDENCE. — Where the plaintiff sets out in his complaint a certain sworn statement, he cannot object to its being read in evidence by the defendant.

THE opinion states the case.

F. Winter, J. B. Elam, H. C. Allen, and U. J. Hammond, for the appellants.

R. Hill, R. N. Lamb, S. M. Shepard, H. Cale, J. E. McDonald, J. M. Butler, A. H. Snow, and A. L. Mason, for the appellee.

COFFEY, J. The amended complaint in this cause consists of two paragraphs. The first alleges, substantially, among other things, that Henry H. Catherwood, deceased, at the time of his death was the owner of 308 shares, of the par

value of one hundred dollars each, of the capital stock of the Citizens' Street Railway Company; that he died intestate on the thirty-first day of August, 1872, leaving as his only surviving heirs at law Lucy D. Catherwood, his widow, since married to one Phelps, and two infant children, namely, Ellen B. and John C. Catherwood; that said Lucy D. Catherwood was duly appointed and qualified as the administratrix of the estate of the said Henry H. Catherwood, deceased, and on the twelfth day of July, 1873, upon petition to the circuit court of Marion County, procured the following order from said court, namely:—

“Comes now Lucy D. Catherwood, administratrix of Henry H. Catherwood's estate, and files her petition praying that she be allowed to dispose of 308 shares of the stock of the Citizens' Street Railway Company of Indianapolis, of the par value of one hundred dollars per share, and which has been appraised at the value of fifteen cents on the dollar, and to sell the same at private sale for the appraised value thereof; and now the court having heard said petition, and being fully advised in the premises, and satisfied that the interests of said estate will be best served by selling the same at private sale, the said administratrix is therefore ordered and empowered to sell the said stock at private sale for the appraised value thereof, taking good and sufficient security for the payment of the purchase-money; and said administratrix is further ordered to make a return of her proceedings within ninety days from this date.”

That the administratrix made no sale of said stock whatever pursuant to the terms of said order, and made no sale of said stock in compliance with the terms of the statutes of the state of Indiana regulating the sale of personal property of a decedent's estate at private sale, nor did she make any sale of said stock at public sale; that she, without any authority so to do, assigned and delivered to one John Carlisle said certificates of stock without receiving any pay therefor, and without taking any security of any sort for the purchase-money therefor, taking merely as evidence of said attempted sale, and of the supposed indebtedness therefor, the promissory note of Carlisle for \$6,160, due ten years from date, no part of which note has ever been paid; that no return of said attempted sale to Carlisle, nor of any sale of said stock, nor of the proceedings of the administratrix in reference thereto, was ever made to the court, and no entry in relation thereto

was ever made; that after the attempted sale to Carlisle, the administratrix made out, under oath, a return of said sale, to the effect that she had sold said stock to John Carlisle for the sum of \$6,160 for cash, but the same was never filed or approved by the court; that long after the attempted transfer of said stock to Carlisle, the street-railway company, upon his request, wrongfully issued certificates for said stock to him, and that he, about the year 1875, sold and assigned the same to appellant Tom L. Johnson, who bought the same with knowledge that they were issued in lieu of the certificates formerly held by Henry H. Catherwood, deceased, and that said stock had belonged to his estate, and with knowledge of the order for the sale of the same above set out, and with knowledge that no return of said sale had been made and confirmed by the court; that at the time he so purchased said stock he was a stockholder and director in said street-railway company; that said street-railway company has declared dividends in a large sum, which have been paid to the said Carlisle and the said Tom L. Johnson, and that before the commencement of this suit the appellee demanded said stock of the appellants, and each of them, which they each refused to surrender.

The second paragraph of the amended complaint does not differ materially from the first, except in that it alleges that on the sixteenth day of July, 1873, the Citizens' Street Railway Company, upon the request of Carlisle, having knowledge of the fact that said stock belonged to the estate of Henry H. Catherwood, and having knowledge of the pending administration of said estate, and of the order of sale of said stock, and the terms thereof, and having knowledge of the fact that no return of any sale under said order had as yet been made to the court, wrongfully issued certificates of stock to Carlisle, who sold and assigned the same to Johnson.

To this complaint the appellant the Citizens' Street Railway Company filed an answer consisting of three paragraphs.

The third paragraph avers, substantially, that, on the sixteenth day of July, 1873, Lucy D. Catherwood, as the administratrix of the estate of Henry H. Catherwood, obtained the order set out in the complaint, authorizing her to sell the 308 shares of the capital stock of the Citizens' Street Railway Company named in the complaint; that said stock was represented by certificates numbered 96, 97, 98, 99, 100, and 101, for fifty shares each, issued to H. H. Catherwood, No-

vember 18, 1867; certificates numbered 33, 35, and 36, for one share each, issued to E. B. Martindale, February 13, 1865, and indorsed in blank by Martindale; and certificate numbered 37, for five shares, issued to R. B. Catherwood, February 13, 1865, which was indorsed in blank by said Catherwood; that said Lucy D. Catherwood, as authorized and empowered as such administratrix to sell said stock at private sale, made the following indorsement upon each of said certificates numbered 96, 97, 98, 99, 100, and 101:—

"I hereby transfer all my interest in the within stock to John Carlisle. July 16, 1873.

"LUCY D. CATHERWOOD."

"For value received, I assign and transfer to John Carlisle three hundred shares of the capital stock of the Citizens' Street Railway Company, this July 16, 1873.

"LUCY CATHERWOOD,
"Adm'x of H. H. Catherwood."

And upon certificates numbered 33, 35, and 36 she made the following indorsement:—

"I hereby transfer all my interest in the within stock to John Carlisle. July 16, 1873.

"LUCY D. CATHERWOOD."

"For value received, I assign and transfer to John Carlisle three shares of the capital stock of the Citizens' Street Railway Company, this sixteenth day of July, 1873.

"E. B. MARTINDALE,

"By LUCY D. CATHERWOOD, Att'y in Fact."

And a similar indorsement on certificate numbered 37, and delivered the said certificates to John Carlisle, to be brought by him to the office of said company, and to have the same transferred to him as the owner thereof on the books of said company; that said Carlisle brought said stock to the office of the company, and requested that the same be transferred to him by canceling the said certificates, and issuing new certificates to him in lieu thereof; that the company caused the records of the Marion circuit court to be examined, and ascertained that said administratrix had full power to dispose of said stock at private sale, as set forth in the complaint, and relying upon the order of the court and the indorsements made by said administratrix, and on the fact that said certificates, so indorsed, were in the possession of said Carlisle, and believing him to be the owner and purchaser of said

stock, made such transfer of said stock to him, and canceled said certificates, and issued to him in lieu thereof a new certificate, numbered 135, for 308 shares of stock.

The appellant Johnson filed an answer consisting of four paragraphs.

The third paragraph avers, substantially, that the stock in controversy was represented by certificate numbered 135, issued by the Citizens' Street Railway Company to John Carlisle, on the seventeenth day of July, 1873, and in whose name the stock was then standing on the books of said company; that said stock was indorsed by said Carlisle, and had been pledged to the First National Bank of Indianapolis by him, or by some one in his behalf, and was so held by said bank at the time appellant purchased the same; that at the time of said purchase he had no knowledge where said stock came from, or who its previous owner had been; that at the time of the transaction between Carlisle and the Citizens' Street Railway Company and Lucy D. Catherwood, he was a citizen of the state of Kentucky, and had no connection with or interest in said company, and had no knowledge or information of its affairs, and purchased and paid for said stock without any notice or knowledge whatever of the claim of any other person thereto, believing it to be, as it purported to be, a genuine certificate of the ownership of 308 shares of the capital stock of said company; that he denies that he had any knowledge that said certificate had been issued in lieu of certificates formerly owned or held by Henry H. Catherwood, or that it had been owned by his estate, or that any order had been made for the sale of any stock belonging to said estate.

The fourth paragraph avers, substantially, the same facts averred in the third answer of the Citizens' Street Railway Company, above set out, and in addition thereto that the administratrix permitted the stock to be and remain in the name of John Carlisle, and authorized him to treat said stock as his own property, and held him out to the public as the owner thereof; that said Carlisle, or some one in his behalf, pledged said stock to the First National Bank of Indianapolis, as the owner thereof, to secure his individual indebtedness to said bank; that the said administratrix made no objection thereto, but, on the contrary, made return to the Marion circuit court, on oath, that she had sold said stock to Carlisle for cash, and filed the same in the records of said

court, where the settlement of said estate was pending; that he afterwards purchased said stock of said bank, and at the time he purchased the same he was induced to believe, and did believe, from the conduct of said administratrix, that said bank held said certificate from Carlisle as the owner thereof, and that he had no knowledge or information as to any claim thereto by the estate of Henry H. Catherwood; that at the time he purchased the same he had no knowledge or information that the same had been issued in lieu of stock formerly held by Henry H. Catherwood or his estate, and no knowledge or information of the legal proceedings set up in the complaint.

To each of these answers the court overruled a demurrer. Upon issues formed, the cause was tried by the court, at special term, resulting in a finding and judgment in favor of the appellants. Upon appeal to the general term the judgment was reversed, from which latter ruling this appeal is prosecuted.

The first question demanding our consideration relates to the rulings of the court at special term in overruling the demurrer to these several answers; and first in order is the third paragraph of the separate answer of the Citizens' Street Railway Company.

The capital stock in the Citizens' Street Railway Company owned by Henry H. Catherwood at the time of his death was personal property: Angell and Ames on Corporations, 11th ed., pp. 590-596, secs. 557-560; Rev. Stats. 1881, sec. 4152; 1 Rev. Stats. 1876, p. 757, sec. 10.

Upon the death of Henry H. Catherwood the stock descended to his heirs at law, subject to the right of his administrator to subject the same to sale in the manner prescribed by the laws of the state. The common-law right of the administrator to sell and dispose of personal property does not exist in this state. Sales of such property must be made in the manner prescribed by our statutes upon the subject. In the absence of an order from the proper court, the sale must be public, and where a sale is made at private sale under the order of the court, it must be made in substantial compliance with the order: *Weyer v. Second Nat. Bank*, 57 Ind. 198; *Williams v. Perrin*, 73 Ind. 57; 2 Rev. Stats. 1876, p. 509, sec. 48; 2 Rev. Stats. 1876, p. 512, sec. 60; Rev. Stats. 1881, secs. 2275-2289.

It is contended by the appellee that in cases of private

sales made under the order of the court, no title passes until such sale is reported and approved by the court.

In this position we think he is in error. The statute authorizing the private sale of personal property of the decedent by an administrator is most useful where the property is of a perishable nature, such as can best be disposed of in the public market, or such as would probably be sacrificed at a public sale.

In view of the fact that the courts are not in session in many of the counties of the state more than six months in the year, the construction contended for by the appellee would, in a great measure, destroy the usefulness of the statute. Such a construction would render it inconvenient, if not impossible, to sell in the open market. It would be utterly impossible to sell a stock of goods by retail at private sale, however apparent it might be that a public sale would result in a loss to the estate. We are of the opinion that where the order of the court does not require a confirmation, if the sale is made in substantial compliance with the order of the court, the title passes to the purchaser upon his compliance with the terms of the sale: *Hobson v. Ewan*, 62 Ill. 146; *Stowe v. Kimball*, 28 Ill. 93; *Moffitt v. Moffitt*, 69 Ill. 649. Doubtless in all cases the court may, in its discretion, require by its order that the sale shall be reported and confirmed, in order to pass title to the property: *Williams v. Perrin*, 73 Ind. 57.

It is also probably true that where there is any material deviation from the order to sell, no title would pass until such sale was reported and confirmed by the court.

In this case, however, there seems to have been no attempt to comply with the order made for the sale of the stock in controversy at private sale.

The sale was on a credit of ten years, whereas the administratrix had no power to give a credit exceeding twelve months: 2 Rev. Stats. 1876, p. 510.

The order of the court required the administratrix to take good and sufficient security for the purchase price of the stock, but instead of following the order, she took the individual note of John Carlisle without security. This attempted sale is no better than if there had been no order of the court. The sale to Carlisle on a credit of ten years, without any security, was not a sale under the order procured by the administratrix, and was, in our opinion, void, and vested no title.

The Citizens' Street Railway Company had notice that the

stock in question belonged to and was a part of the estate of Henry H. Catherwood. It also had notice that the Marion circuit court had acquired jurisdiction over this property, and had made an order to sell the same at private sale. Indeed, the answer discloses the fact that it had examined the proceedings under which the attempted sale to Carlisle was made. We do not think the company exercised that degree of diligence required by the law, when it stopped with the examination of the order of sale. Before canceling the stock held by the estate of Catherwood, it should have gone further, and ascertained whether such a sale had been made under that order as vested title in Carlisle. It was its duty, before canceling the stock at the request of Carlisle, and issuing to him stock in lieu thereof, to ascertain that he was the owner of the stock in his possession, and having failed to perform such duty, we think it liable to make good any loss occasioned thereby. Before the company could lawfully cancel the stock held by Catherwood's estate, it was bound to know, not only that an order of sale had been entered by the court, but that a sale had also been made pursuant to the terms of that order: *Nugent v. Laduke*, 87 Ind. 482; *Weyer v. Second Nat. Bank*, 57 Ind. 198, 211; Angell and Ames on Corporations, 10th ed., sec. 582; *Loring v. Salisbury Mills*, 125 Mass. 138.

In our opinion, the superior court of Marion County at special term erred in overruling the demurrer to the third paragraph of the separate answer of the appellant the Citizens' Street Railway Company.

The answers of the appellant Johnson present a question entirely different from the one presented by the answer of the Citizens' Street Railway Company.

The certificates of stock owned by the estate of Henry H. Catherwood were canceled by the company, and a new certificate in lieu thereof was issued to John Carlisle in his own name. So far as appears, there was nothing on the face of the new certificate to put any one on inquiry, or to give notice that it was issued in lieu of the Catherwood stock. In this condition Johnson bought it in the market, without any notice that it had any connection with Catherwood's estate. The question is therefore presented as to whether Johnson, under these circumstances, is liable to account to the estate for the stock purchased by him.

Could the appellee show that Johnson, and those through whom he makes his title, had notice of the fact that the Carh-

erwood stock entered into and formed the consideration of the stock purchased by him, doubtless he could follow such consideration, and charge Johnson with it. The complaint seems to proceed upon the theory that it was necessary to charge Johnson with such notice; but as notice is denied by the answers, in considering the demurrer thereto we must treat the case as one in which he purchased in good faith without notice.

We are bound to know that stocks of the kind now under consideration constitute a considerable article of the commerce of the country, and that they are daily bought and sold in the market. To hold that where such stock is thrown upon the market, the purchaser must inquire into the antecedents of the same, and into the consideration upon which it was issued by the corporation, would be to destroy the value of such property as an article of commerce. If the property was offered for sale at a market remote from the office of the company, such inquiry would be practicably impossible, and hence the stock, in such market, would be of no value.

We are not inclined to adopt the view that a purchaser of such property is bound to make such examination, unless there is something upon the face of the stock, or something connected with the transaction, to put him on inquiry. Of course, every one purchasing such stock takes the chances as to whether it is genuine, and as to whether the corporation had the legal authority to issue it, but where the stock is issued by a corporation having the legal authority to do so, is genuine, and is regular upon its face, we think a purchaser in good faith, without notice of infirmities which could be ascertained only by an examination of the records of the company, should be protected: *Salisbury Mills v. Townsend*, 109 Mass. 115; *Machinists' Nat. Bank v. Field*, 126 Mass. 345; *Mount Holly etc. Co. v. Ferree*, 17 N. J. Eq. 117.

But in this case Johnson did not purchase the certificates of stock owned by Catherwood. Those certificates were canceled by the Citizens' Street Railway Company.

The stock purchased by Johnson was evidenced by new certificates issued to John Carlisle by the company in consideration of the surrender and cancellation of the certificates held by Catherwood at the time of his death. As to whether the company was authorized to issue the certificates purchased by Johnson, and whether they are valid, are questions

between him and the company, and one into which we need not inquire in this case.

But as he did not purchase the stock evidenced by certificates once held by Catherwood, and had no notice that such stock ever existed at the time of his purchase, we think it follows that he is in no way liable to Catherwood's estate.

In the case of *Salisbury Mills v. Townsend*, 109 Mass. 115, it was expressly held that a purchaser of such stock was not bound to examine the books of the corporation, or look beyond the certificates assigned to him, in search after the validity of former assignments.

In cases like this, where the old certificates have been surrendered and a new one issued in lieu thereof, the doctrine is, that the remedy is against the corporation issuing the new certificate, and that a purchaser of the stock represented by the new certificate in good faith, for value, and without notice of any illegality in the surrender and cancellation of the original certificates, will be protected: *Pratt v. Taunton Copper Mfg. Co.*, 123 Mass. 110; 25 Am. Rep. 37; *Machinists' Nat. Bank v. Field*, 126 Mass. 345; *Allen v. South Boston R. R. Co.*, 150 Mass. 200; 15 Am. St. Rep. 185.

In our opinion, the court at special term did not err in overruling the demurrer to the third and fourth paragraphs of the answer of the appellant Johnson.

A question is also made as to the ruling of the court at special term in admitting in evidence a report made out and sworn to by the administratrix, in which she states that she had sold the stock in question to John Carlisle for cash.

The report, so far as the evidence in the cause discloses, was never filed or approved by the court. In this condition, it amounts to the mere declaration of the administratrix, and constitutes no part of the record in the proceeding to sell the stock. But assuming, without deciding, that it was not proper evidence in the cause, we do not think the appellee, who objected to its introduction, stands in a situation to make such objection. This paper is set out in full in each paragraph of the amended complaint, and is thus made a part of the record in this cause. As it was already a part of the record, and was, as such, before the court, we do not see how the appellee could be injured by allowing the appellants to read it to the court.

In our opinion, the superior court at general term did not err in reversing the judgment of the special term as to

the appellant the Citizens' Street Railway Company, but it did err in reversing the judgment as to the appellant Johnson.

The judgment of the superior court as to the appellant the Citizens' Street Railway Company is affirmed, and said judgment as to the appellant Tom L. Johnson is reversed.

CORPORATIONS — STOCK — PERSONALTY. — Shares of stock in a corporation are personal property: *Tregear v. Eliwanda etc. Co.*, 76 Cal. 537; 9 Am. St. Rep. 245.

EXECUTORS AND ADMINISTRATORS — SALES. — An administrator's sale is void unless the provisions of the statute are strictly pursued: *Worten v. Howard*, 2 Smedes & M. 527; 41 Am. Dec. 607, and note.

EXECUTORS AND ADMINISTRATORS — SALES. — Where an administrator's sale does not in every respect conform to the order of sale, it is incumbent upon him to show that he exercised sound judgment, and acted with a view to the best interests of the parties: *Lamb v. Lamb*, 1 Speers Eq. 289; 40 Am. Dec. 618, and note.

CORPORATIONS — LIABILITY FOR UNAUTHORIZED TRANSFERS OF STOCK. — A corporation must see that no unauthorized transfers of its stock are made, and is liable to any one injured by a breach or neglect of this duty: *Marbury v. Ehlen*, 72 Md. 206; 20 Am. St. Rep. 467, and note.

AUSTIN v. DAVIS.

[128 INDIANA, 472.]

STATUTE OF FRAUDS SATISFIED BY CONTRACT THAT CAN BE EXTRACTED FROM CORRESPONDENCE. — If a contract which comes within the statute of frauds can be extracted from correspondence between the parties upon the subject of the contract, the statute is satisfied.

AGREEMENT TO MAKE CHILD HEIR, EFFECT OF. — Where a husband and wife, without children of their own, agreed to take a young child, provide for and bring her up as their own, and at their death leave her all their property, and the husband, with his wife's assent, afterwards adopted the child, it was held, — 1. That the husband was not precluded by the contract from the perfectly free and unrestrained enjoyment of his property, and that he could dispose of it as he pleased, at any time during his life, by gift or otherwise; 2. That a conveyance in good faith, during his lifetime, of all his property to his wife vested in her an absolute title free from any trust in favor of the child; 3. That the contract was void as to the wife, and incapable of subsequent ratification by her, because of her coverture at the time it was entered into; 4. That a new verbal contract, made by the wife after her husband's death, was within the statute of frauds, and that a part performance by the child did not take it out of the statute.

THE opinion states the case.

U. J. Hammond and E. S. Rogers, for the appellant.

T. S. Rollins, for the appellees.

COFFEY, J. The complaint in this cause consists of three paragraphs.

The material allegations in the first paragraph are, substantially, that in the year 1868, when the appellant was four years of age, John S. Johnson and Elizabeth D. Johnson, husband and wife, without children, and residing in the city of Indianapolis, proposed, in writing, to the mother of the appellant, then living alone with the appellant at the town of Neoga, in the state of Illinois, that if the said mother would surrender to them the appellant they would take her as their own child, provide for her and bring her up as their own, and at their death leave her all their property; that said proposition was contained in a letter written to the mother of the appellant by the said Elizabeth D. Johnson, and signed by her for her said husband, John S. Johnson, and herself; that the letter is lost, and a copy cannot be filed with the complaint; that said proposition was accepted, and the custody of appellant surrendered to the said Johnson and Johnson; that in the year 1869 said John S. Johnson, by proceedings in the proper court, adopted the appellant as his daughter, and she thereupon took upon herself the name of Johnson; that the said Elizabeth Johnson was present in court at the time said proceedings were had and gave her assent thereto, and thereafter promised the mother of the appellant that she would treat appellant as her daughter; that thereafter the appellant remained with said Johnson and Johnson, rendering to them all the duties, affection, and obedience due from a natural child until she was eighteen years of age, when, with their consent and approval, she intermarried with Charles Austin, which marriage occurred in the year 1882, and that during the time she so lived with them she was treated as their daughter; that the said John S. Johnson departed this life, intestate, on the sixth day of April, 1887, having disposed of his property to the said Elizabeth D. Johnson while yet in life, and leaving no children except the appellant; that the said Elizabeth D. Johnson at all times, up to the time of her death, treated the appellant as her daughter, and declared that she desired the appellant to have all her property after her death; that the said Elizabeth D. Johnson died intestate on the eighth day of March, 1888, leaving no issue of her body nor the descendants of any issue, but leaving the appellant, whom she had, up to the time of her death, reared, trained, and loved, and held out to the world as her child, and whom she had

declared, up to the time of her death, she desired to take and have all her property, both real and personal; that the appellees claim to be the heirs of the said Elizabeth D. Johnson, and deny the right of the appellant to any portion of the property owned by the said Elizabeth at the time of her death.

This paragraph contains a description of the real estate owned by Elizabeth D. Johnson at the time of her death, and alleges that the personal estate amounts to the sum of nine hundred dollars, and prays that the right of the appellant to said property be ascertained and fixed by a proper decree.

The second paragraph of the complaint, in legal effect, does not differ materially from the first paragraph, except in that it alleges that Elizabeth D. Johnson was in court at the time the record was made adopting the appellant by John S. Johnson, and believed herself to be a party thereto and to be bound thereby, and that she died in that belief; that the property conveyed by John S. Johnson to his wife, the said Elizabeth D. Johnson, was a voluntary conveyance and without any consideration whatever, and at the time she took the same she had full knowledge of the obligations of the said John S. Johnson to the appellant under the terms of said contract.

No question is made in this court in relation to the third paragraph of the complaint, and we need not, for that reason, state its contents.

The circuit court sustained a demurrer to each paragraph of the complaint, and the propriety of that ruling is called in question by a proper assignment of error.

This is not an action by the appellant to recover damages for a breach of the contract set up in the complaint, nor is it an action to recover the value of services rendered by the appellant to John S. Johnson and Elizabeth D. Johnson, but the complaint is constructed upon the theory that the appellant is entitled to specific performance.

It has been decided by this court that where a childless husband and wife, in consideration that a young girl should live with them until the death of both, in all respects as their own child, and render such services as she was capable of doing, orally agreed to make her their heir, and at their death, or the death of the survivor, to will her the entire estate of which they were possessed, consisting, at the death of the survivor, of real estate, and also of personal property

exceeding in value fifty dollars, the agreement was within the statute of frauds, and that a performance on the part of the girl did not take it out of the statute: *Wallace v. Long*, 105 Ind. 522; 55 Am. Rep. 222, and authorities there cited.

It is sought by the complaint before us to take the case at bar out of the rule announced in this case by alleging that the contract was embodied in a letter written to the mother of the appellant. If a contract which comes within the statute of frauds can be extracted from correspondence between the parties upon the subject of the contract, the statute is satisfied: *Wills v. Ross*, 77 Ind. 1; 40 Am. Rep. 279; *Thames etc. Co. v. Beville*, 100 Ind. 309.

The allegations in relation to the letter, resulting in the contract set up in the complaint, are somewhat vague and uncertain. We are left in doubt as to whether the name of John S. Johnson was signed to the letter which it is alleged was written to appellant's mother.

It is not alleged that John S. Johnson wrote the letter, but the allegation is that it was written by his wife, and signed by her for her husband and herself. Assuming, however, that the letter was of such a character as to bind John S. Johnson, we are confronted with the question as to what were his duties and obligations under the terms of the contract contained therein.

It bound him to leave to the appellant whatever property he might possess at the time of his death. This he could do in two ways, namely: 1. By adopting the appellant, so that she would take the property by inheritance from him; 2. By the execution of a will, in proper legal form, so as to bequeath to her his property.

He chose to adopt the first mode, but before his death he conveyed and transferred, or caused to be conveyed and transferred, all his property to his wife, Elizabeth D. Johnson, and at the time of his death had no property which the appellant could inherit from him.

All the authorities agree that such a contract as the one now under consideration left John S. Johnson perfectly free and unrestrained in the enjoyment of his property, and that he could dispose of it as he pleased, at any time during his life, by gift or otherwise: *Van Duyne v. Vreeland*, 12 N. J. Eq. 142; *Jeremy's Eq. Jur.*, 1st Am. ed., 401; 1 *Story's Eq. Jur.*, sec. 382.

It is not claimed that the transfer made by John S. Johnson to his wife was made for the purpose of defrauding the appellant, and we must presume, therefore, that it was made in good faith, and for some lawful purpose.

Under these facts, it cannot be successfully maintained that John S. Johnson was guilty of any breach of the contract set out in the complaint. Nor are we able to perceive how it can be successfully maintained, by any process of legitimate reasoning, that the property of John S. Johnson became charged with any trust, since he was at liberty to dispose of it at his pleasure. Ordinarily, one who holds property in trust for another must keep it for the benefit of the *cestui que trust*. It would be idle to say that one has the legal right to dispose of his property in such manner as to him seemed best, even to making a donation of it, and at the same time say that the person taking it took it subject to a trust which might, in certain contingencies, be enforced.

We are not inclined to adopt the contention of the appellant that the property of John S. Johnson became charged with a trust in favor of the appellant, and that Elizabeth D. Johnson took it subject to such trust.

As John S. Johnson possessed the undoubted right to dispose of his property, we think his wife took the absolute title to the same free from any charge against it on account of any contract made by him with the appellant.

And this brings us to a consideration of the obligations and duties of Elizabeth D. Johnson under the contract in suit. At the time the contract was entered into, she was a married woman, and the contract as to her was void for want of power in her to bind herself by such a contract: *Long v. Brown*, 66 Ind. 160; *Hodson v. Davis*, 43 Ind. 258; *O'Daily v. Morris*, 31 Ind. 111; *Johnson v. Tutewiler*, 35 Ind. 353; *Maher v. Martin*, 43 Ind. 314.

It is contended by the appellant that, under the facts stated in the complaint, it must be held that Mrs. Johnson, after she ceased to be a married woman, ratified the contract made by her while under coverture, or that she made a new contract.

It appears by the complaint that the appellant became a married woman prior to the death of John S. Johnson; and while it does appear that she, subsequent to his death, resided with Mrs. Johnson under the same roof, she could not occupy that relation which she occupied prior to her marriage.

Furthermore, it is a general principle of law that a void contract cannot be ratified, and this principle has been held to apply to the contracts of married women: *Long v. Brown*, 66 Ind. 160. In this case, it was said by this court, speaking of the contract of a married woman then in suit: "Such contract is not susceptible of ratification. Nothing short of a new, valid, and binding contract, made after the death of her husband, upon a new consideration, can operate as a contract to deprive her of her interest in the land."

It is not claimed that Elizabeth D. Johnson made any new written contract after the death of her husband. If she made any contract at all, it was a verbal one. As we have seen, such a contract is within the statute of frauds, and cannot be enforced: *Wallace v. Long*, 105 Ind. 522; 55 Am. Rep. 222.

The appellant relies upon the case of *Van Tine v. Van Tine* (New Jersey, Sept. 1888), 13 Cent. Rep. 354, and the cases of *Sharkey v. McDermott*, 16 Mo. App. 80, and *Sharkey v. McDermott*, 91 Mo. 647; 60 Am. Rep. 270. In each of these cases it was held that performance on the part of the child was sufficient part performance to take the case out of the statute of frauds. This is in direct conflict with *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222, and *Johns v. Johns*, 67 Ind. 440.

We cannot follow the case of *Van Tine v. Van Tine* (New Jersey, Sept. 1888), 13 Cent. Rep. 354, and the cases of *Sharkey v. McDermott*, 16 Mo. App. 80, 91 Mo. 647, 60 Am. Rep. 270, without overruling the case of *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222, and the cases upon which it rests. To hold that specific performance could be had in this case, as to the real estate of which Mrs. Johnson died seised, there being no valid written contract between the appellant and Mrs. Johnson, and no possession of such real estate having been surrendered under the contract, would also be in conflict with the cases of *Atkinson v. Jackson*, 8 Ind. 31; *Watson v. Mahan*, 20 Ind. 223; *Lafollett v. Kile*, 51 Ind. 446; *Law v. Henry*, 39 Ind. 414; *Stater v. Hill*, 10 Ind. 176; *Moreland v. Lemasters*, 4 Blackf. 383; and *Arnold v. Stephenson*, 79 Ind. 126.

In our opinion, the court did not err in sustaining the demurrer to the complaint before us

Judgment affirmed.

STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM.—A letter is a sufficient memorandum to take a contract out of the statute of frauds, and to subject the defaulting party to an action for his breach of agreement:

Mizell v. Burnett, 4 Jones, 249; 69 Am. Dec. 744. See *Givens v. Calder*, 2 Desaus. 172; 2 Am. Dec. 686.

WILLS — AGREEMENTS TO MAKE — VALIDITY OF. — A person may make a valid agreement to make a particular disposition of his property by will: *Carmichael v. Carmichael*, 72 Mich. 76; 16 Am. St. Rep. 528, and note. An oral promise to devise is revocable: *De Moss v. Robinson*, 46 Mich. 62; 41 Am. Rep. 144. For a discussion of agreements to make testamentary disposition of property, and their enforcement, see extended note to *Johnson v. Hubbell*, 10 N. J. L. 332; 66 Am. Dec. 784-790.

WESTERN PAVING AND SUPPLY COMPANY v. CITIZENS' STREET RAILROAD COMPANY.

[128 INDIANA, 525.]

CHARTER TO STREET-RAILWAY COMPANY CONSTITUTES CONTRACT. — A charter granted by a city council to a street-railway company to construct and operate a street-railway within the corporate limits of a city constitutes a contract between such railway company and the city.

CHARTER OF STREET-RAILWAY COMPANY STRICTLY CONSTRUED AGAINST IT. — A charter granted by a city council to a street-railway company is to be strictly construed against the company. It has no doubtful rights under such charter; for where there are doubts, they are construed against the grantee, and in favor of the city.

CONSIDERATION FOR AMENDED CITY ORDINANCE, WHAT SUFFICIENT. — Where a city ordinance, passed in 1864, authorizing a street-railway company to use the streets of the city to construct and operate a street-railway, provided that the company should bowlder the space between the rails of its track, and pave, bowlder, or otherwise improve and keep in repair two feet on the outside of each rail, was amended by an ordinance, passed in 1878, providing instead that the company should keep the tracks and two feet on the outside of each rail, together with all bridges and the crossings of all gutters, at all times, in good repair, both of which ordinances were accepted by the company, and the latter of which was passed in consideration that the company should unite its systems, charge a fare of five cents for transportation to any part of the city, and construct certain additional lines of railway within a specified time, a compliance by the company with the conditions of the amended ordinance was a sufficient consideration therefor, and when it was accepted by the company and its conditions complied with, it became a binding contract.

CITY COUNCIL CANNOT IMPOSE UPON STREET-RAILWAY COMPANY ADDITIONAL OBLIGATION TO PAVE STREET WHEN. — Where a city ordinance provides that a street-railway company shall keep the space between the rails and two feet on the outside of each rail, together with all bridges and the crossings of all gutters, at all times, in good repair, the city cannot, by a subsequent ordinance, impose on the company, without its consent, the obligation to pay a proportionate share of the cost of paving a street occupied by its railway.

PAROL EVIDENCE INADMISSIBLE TO PROVE ADDITIONAL CONSIDERATION FOR WRITTEN CONTRACT WHEN. — Where a city council, by an ordi-

nance not accepted by a street-railway company, seeks to impose upon the company an additional obligation to pay for the improvement of a street, and such council, by a subsequent ordinance, grants to another company, which has purchased the railway from the former company, all the rights, privileges, and franchises of the old company, in consideration of its assuming all the duties and obligations of the latter, parol evidence is not admissible to prove that the new company, in consideration of the passage of the ordinance ratifying and approving the sale, accepted the ordinance which sought to make the old company liable for such street improvement.

STREET-RAILWAY COMPANY NOT ESTOPPED TO DENY VALIDITY OF STREET ASSESSMENT WHEN. — A street-railway company whose property is not subject to assessment for street improvements is not estopped to deny its liability for the assessment, because it stands by without objection until the improvements are completed, where the city has the right to make the improvements and the company has no right to object.

ACTION on a street assessment. The opinion states the case.

A. C. Harris and L. Cox, for the appellant.

H. C. Allen, F. Winter, and J. B. Elam, for the appellee.

COFFEY, J. This case was under consideration by the late Judge Mitchell, prior to his death, and, while so considering it, he prepared the following statement, which we adopt: —

"On the eighteenth day of January, 1864, the common council of the city of Indianapolis passed an ordinance authorizing the Citizens' Street Railway Company, which had been duly organized under the general laws for the incorporation of street-railways, to use the streets of the city for the purpose of constructing and operating thereon a street-railway. Among other things, it was provided in the ordinance that the company should bowlder that part of the street it might thereafter occupy lying between the rails of its track, and also that it should pave, bowlder, or otherwise improve and keep in repair two feet on the outside of each rail, so as at all times to correspond with the street outside. Pursuant to the above ordinance, the street-railway system was in part constructed. Subsequently, in the month of April, 1878, the common council and board of aldermen amended so much of the ordinance of 1864 as imposed upon the company the duty of bowldering the part of the street between the rails of its track, and paving, or otherwise improving, as the street might be, a space outside the tracks on either side, and instead thereof provided that 'the said company shall keep the tracks and two feet on the outside of each rail, together with all

bridges and the crossings of all gutters, at all times, in good repair, to the satisfaction of the common council.' The company was required to signify its acceptance of the amendment within thirty days, and it is averred that the ordinance as amended was duly accepted.

"It appears that afterwards, in April, 1884, an ordinance was duly adopted, in which it was provided that when any street, upon which there existed a line of railway, was improved from curb to curb, the improvement should be made under contract, as required by law, and that the street-railway company should be liable to the contractor for its proportion of the total cost, the proportion to be determined by the city civil engineer according to the method prescribed in the ordinance.

"Nothing appears to indicate that the company accepted or consented to the provisions of this last ordinance.

"Subsequently, in 1888, the property and franchises of the corporation hereinbefore named were transferred to the Citizens' Street Railroad Company, a new corporation then recently organized. The new company presented to the common council an ordinance known as the ordinance of April 23, 1888, which was duly adopted, and which is of the tenor following:—

"Be it ordained by the common council and board of aldermen of the city of Indianapolis, that the sale and transfer heretofore made by the Citizens' Street Railway Company of Indianapolis, Indiana, of all its property, rights, franchises, and privileges in the city of Indianapolis to the Citizens' Street Railroad Company of the city of Indianapolis, its successors and assigns, subject to all the duties, conditions, and obligations heretofore imposed and now resting on said railway company, be and the same is hereby ratified and approved; and all said rights, privileges, and franchises heretofore possessed by said old corporation are granted to and confirmed in said new corporation, its successors and assigns, subject to the same duties and obligations as vested in said old corporation.'

"In 1889 an ordinance was duly passed for the regrading of two squares of Pennsylvania Street with asphalt. The contract was duly let to the Western Paving and Supply Company, and the work was done and accepted by the city, the amount estimated as the proportion to be paid by the company, according to the provisions of the ordinance of 1884,

being \$3,716.28. The railway company denied its liability, whereupon the contractor instituted this suit to recover the amount."

The central position which the street-railway company plants itself upon is, that the ordinance passed by the common council of the city of Indianapolis in 1864, and the amendment thereto adopted in 1878, both of which were duly accepted by its predecessor, had the force and effect of a contract which could not be altered or impaired without its consent; that the old company had never consented to nor accepted the ordinance of 1884 which sought to impose upon it more extended obligations, and that by the ordinance of April 23, 1888, the new company became subject to the same duties and obligations that had theretofore been imposed upon the old, no greater and no less, and it was not bound by the ordinance passed in 1884, by which the obligation of paying a proportionate share of the cost of street improvements was sought to be imposed upon the old company.

The vital question to be decided by this court is this: Does the amendatory ordinance of April, 1878, providing that the Citizens' Street Railway Company should keep the space between its tracks and two feet on the outside of each rail, together with all bridges and crossings of gutters, at all times, in good repair, to the satisfaction of the common council and board of aldermen, and to cause the space between its tracks and two feet on the outside of each rail to conform to the grade of the street on which the same is laid, amount to a contract, based upon a sufficient consideration, the legal effect of which was to release the company from the performance of duties imposed by the ordinance of 1864, to which the appellee succeeded by its purchase from that company?

Many of the questions governing the rights existing between street-railway companies and the cities in which they operate their roads, under charters granted by such cities, seem to be too well settled to admit of longer controversy, while many other questions remain in doubt and uncertainty.

It is settled that a charter granted by the common council to a street-railway company to construct and operate a street-railway within the corporate limits of a city constitutes a contract between such railway company and the city: *Chicago v. Sheldon*, 9 Wall. 50; *Coast Line R. R. Co. v. Mayor etc.*, 30 Fed Rep. 646; *State v. Corrigan etc. Street R'y Co.*, 85 Mo. 263; 55 Am. Rep. 361; *District of Columbia v. Washing-*

ton etc. Co., 3 McAr. 473; *Farrar v. City of St. Louis*, 80 Mo. 379; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Greenwood v. Freight Co.*, 105 U. S. 13; *New Jersey v. Yard*, 95 U. S. 104.

It is also settled that such charter is to be strictly construed against the railway company, and that it has no doubtful rights under such charter; for where there are doubts, they are construed against the grantee and in favor of the city: *Citizens' R'y Co. v. Jones*, 34 Fed. Rep. 579; *Mayor etc. v. Ohio etc. R. R. Co.*, 26 Pa. St. 355; *Birmingham etc. R'y Co. v. Birmingham etc. R'y Co.*, 79 Ala. 465; 58 Am. Rep. 615; *West Philadelphia etc. R'y Co. v. City of Philadelphia*, 10 Phila. 70.

It seems to be settled that a street-railway company is bound to keep in repair that portion of the street used by it, even in the absence of a stipulation in its charter requiring it to do so, but the question as to whether it is compelled to improve the street, as ordered by the city, in the absence of a contract to that effect, seems to be in some doubt. It is undoubtedly true that the authorities upon this question are conflicting.

Judge Elliott, in his valuable work on roads and streets, after a careful examination of the authorities upon the subject, at page 594, says: "As much as can be safely affirmed in the present state of the decided cases is, that the private corporation is bound to repair, but is not bound to improve. It is bound to restore, but is not bound to change. . . . It would not, as we interpret the rule sustained by the weight of authority, be compelled to make the new pavement, but it would be its duty, in making repairs after the new pavement was laid, to make them to correspond to the new pavement."

The conclusion reached by Judge Elliott, as stated above, is fully warranted by the authorities cited in support of the text.

By section 5 of the original charter granted to the Citizens' Street Railway Company and accepted by it, that company contracted with the city of Indianapolis to bowlder the streets between the rails, and to pave or otherwise improve the street for a given space outside its rails. If this section was still in force, the case would, we think, be free from difficulty. But if the amendment of 1878 was a valid and binding ordinance, and was accepted by the company, section 5 of the original charter does not now exist, being merged in the amended section. It is to be inferred from the amendment

above referred to, that the company under the original charter had constructed in the city two systems of railway, one south of the union railway tracks and one north, which were wholly disconnected. The city was desirous of having these two systems connected, and of limiting the fare to be charged for the transportation of passengers to any part of the city to five cents, and, also, that the company should construct, within a given time, certain additional lines of railway named in the ordinance. It is recited in the amended ordinance that it is passed by the common council and board of aldermen in consideration that the company will comply with the desire of the city as above expressed.

A compliance by the company with the conditions expressed in the ordinance was, we think, a sufficient consideration for the amended ordinance, and when it was accepted by the company, and its conditions complied with, it became a binding contract. The amount of the consideration was a question to be settled by the contracting parties, and is a matter over which the courts, in the absence of fraud, have no control. This amended section 5 provides, as we have seen, that the company shall keep the space between its rails and two feet on the outside of each rail, together with all bridges at the crossing of gutters, at all times, in good repair, and omits the provisions contained in the original charter that the company should bowlder the space between the rails of the track, and pave or otherwise improve (as the street may be) two feet on the outside of each rail. The contract then made between the city and the company in 1878 was a contract to repair, and not a contract to improve, the streets upon which the railway was then or should thereafter be laid. The question therefore arises, whether the city of Indianapolis possessed the power to pass a binding ordinance, in the year 1884, requiring the street-railway company to pay for improving the streets occupied by its street-railway. The question here presented seems to have been carefully considered, not only by some of the state courts, but by the supreme court of the United States.

In the case of *Coast Line R. R. Co. v. Mayor etc.*, 30 Fed. Rep. 546, the question involved was similar to the one now before us.

In that case the city of Savannah had granted to the Coast Line Railroad Company the right to lay a track upon a certain street in the city on conditions prescribed in an ordi-

nance, one of which was as follows: "In the event of paving by the city of the whole or any part of the streets used by said railroad company, the portion of the track between the rails shall be paved and kept in good order and thorough repair by the company at its own expense and cost." The ordinance was accepted by the company. The legislature of the state authorized the mayor and aldermen of the city to pave the streets, and by section 2 of the act granting such authority, it was provided that any street-railroad company having tracks running through the streets of the city should be required to macadamize or otherwise pave, as the mayor and aldermen should direct, the width of its tracks and three feet on each side of every line of track then in use, or that might thereafter be constructed by such company. Pursuant to the statute, the city passed an ordinance to pave Broughton Street, upon which the company had a track, with asphalt, and directed the company to pave, not only between its rails, but for three feet on each side of the rails, and the company refusing to pave otherwise than between its tracks, the city laid the additional pavement and levied upon the property of the company for payment of the expense. The company brought suit for an injunction, upon the ground that the act of the legislature under which the city acted was in violation of the constitution of the United States, as it impaired the obligation of the contract embodied in the ordinance by which the company had been granted the right to occupy the streets. It was held by the court that the provisions of the ordinance requiring the company to pave and keep in good and thorough repair the portion of the street between the rails of its track, was the limit of the paving to be done by the company, and that the obligation to do this amount of paving was as binding on the city as it was upon the company, and that the act of the legislature above referred to impaired the obligation of this contract, and, under the provisions of section 10, article 1, of the constitution of the United States, was void.

In the case of *State v. Corrigan etc. Street R'y Co.*, 85 Mo. 263, 55 Am. Rep. 361, the ordinance which conferred upon the company the right and privilege of using the streets of the city for a horse-railway contained a provision which required the railway company to keep and maintain the space between its rails and for two feet on either side of its track, and all street crossings along its line, in good repair. It was held that under such ordinance the company could not be

compelled to reconstruct the street; that the obligation to repair a street is not an obligation to construct thereon a new pavement. It was further held that the city could not, by a subsequent ordinance, impose on the company, without its consent, the additional obligation to pave the street; and that a subsequent ordinance attempting to impose such additional burden could not be sustained on the ground that it was the proper exercise of the police power of the city.

In the case of *Chicago v. Sheldon*, 9 Wall. 50, the city of Chicago, by proper ordinance, granted to the North Chicago City Railway Company a charter to construct its railway upon certain streets in the city of Chicago, which charter contained the following provision: "The said company shall, as respects the grading, paving, macadamizing, filling, or planking of the streets, or parts of the streets, upon which they shall construct their said railways, or any part of them, keep eight feet in width along the line of said railway on all the streets wherever one track is constructed, and sixteen feet in width along the line of said railway where two tracks are constructed, in good repair and condition during all the time to which the privileges hereby granted to said company shall extend, in accordance with whatever order or regulation respecting the ordinary repairs thereof may be adopted by the common council of said city."

It was held by the supreme court of the United States, the court of last resort upon questions of the kind we are now considering, that under this charter the company could not be held liable for improvements made on the streets occupied by its railway, and that its obligation could only be extended to the duty of repairing the streets after they had been improved by the city.

In the case of *State v. Corrigan etc. Street R'y Co.*, 85 Mo. 263, 55 Am. Rep. 361, the court, in speaking of the distinction between constructing a street and keeping the same in repair, says: "The obligation to repair a street is one thing, and the obligation to reconstruct a street is another and different thing. To repair a thing is to restore it to a sound state after decay, injury, dilapidation, or partial destruction. To reconstruct is to construct or build again. One who only assumes an obligation to repair a house could not be required to tear it down and rebuild it."

Following these authorities, we are constrained to hold that the Citizens' Street Railway Company, under the amended

charter of 1878, could not have been compelled to pay assessments for street improvements.

Without torturing the language used, and holding that the words "repair," "construct," and "rebuild" are synonymous, and thus putting ourselves in conflict with all the authorities upon the subject, we cannot reach the conclusion that the appellee, which succeeded to the rights of the Citizens' Street Railway Company, is liable under this charter to be assessed for the expense of paving or repaving the streets of the city of Indianapolis.

The conclusion here reached is not in conflict with the case of *Pennsylvania R. R. Co. v. Miller*, 132 U. S. 75. In that case the company obtained its charter from the state at a time when such corporations, under the constitution of the state, were liable for property actually taken in the construction of their railways, but were not liable for consequential damages. Subsequently, the constitution of the state was so amended as to render such corporations liable for consequential damages. It was held that the company had no such contract with the state of Pennsylvania as exempted it from the operation of this constitutional amendment; that it took its charter subject to the general laws of the state, and subject to such changes as might be made therein, and to such changes as might be made in the provisions of the constitution.

It seems plain to us that there is a broad distinction between the principle announced in that case and the case before us, where the appellee has an express contract limiting its liability to the expense of keeping that part of the streets used by it in repair, and exempting it from the burden of improving the streets. That such a contract as the one before us is binding on the city is abundantly established by the authorities above cited.

In the second paragraph of the complaint the appellant alleged, substantially, that the ordinance of 1888, above set out, was presented to the common council and board of aldermen of the city of Indianapolis, and while the same was under consideration, in order to induce the city to accept and pass the same, and as the consideration moving from the appellee to the city therefor, the appellee then and there promised and agreed with the city that if it would pass the ordinance as presented, the appellee would accept, and did then and there accept, and become bound by the ordinance of 1884, above referred to, and that in consideration of said

promise, acceptance, and agreement, the council and board of aldermen did then and there pass the ordinance, and upon no other consideration.

Substantially the same allegations are contained in the first paragraph of the complaint, except that in this paragraph it is alleged that the appellee, to induce the city to accept and pass the ordinance of 1888, represented to the city that by the terms of said ordinance it was bound to comply with the ordinance of 1884, and that the city acted upon this representation and construction, and passed the same.

These allegations, on motion of the appellee, were struck out by the court, and this ruling is assigned as error.

As we have seen, the ordinance of 1888, as well as all other ordinances granting rights to the company, constitutes a contract between the city and the company.

There is no disagreement among counsel as to the general rule that parol evidence will not be received to vary, contradict, add to, or to subtract from the terms of a written contract. Nor is it controverted that the ordinance of 1888 constitutes a written contract between the city and the appellee.

The controversy relates to exceptions to the general rule, and as to whether the case before us falls within any of the exceptions.

It is, substantially, agreed that one of the exceptions to the general rule is that found in Stephen's Digest of Evidence, art. 90, p. 161, namely, that where the existence of any separate oral agreement is alleged as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole transaction between them, such oral agreement may be proven.

It is affirmed by the appellant that the case before us falls within this exception, while the appellee denies it.

In the case of *Welz v. Rhodius*, 87 Ind. 1, 44 Am. Rep. 747, the question now under consideration was very fully considered. The doctrine as announced in that case, however, has been so far modified by later decisions of this court that it is not now, upon the subject we are considering, to be regarded as unquestioned authority: *Singer Mfg. Co. v. Forsyth*, 108 Ind. 334; *Diven v. Johnson*, 117 Ind. 512; *Conant v. National State Bank*, 121 Ind. 323; *Carr v. Hays*, 110 Ind. 408.

In the case of *Conant v. National State Bank*, 121 Ind. 323, it was said by this court: "It is true that the actual consideration of a contract may be shown by parol evidence, but it is not true that where the acts that a party agrees to perform are expressly and specifically set forth, it may be shown by parol evidence that he agreed to do other things. Where the writing states specifically the acts which the parties are to perform, no other acts can be proved by parol except in cases of fraud or mistake."

So in the case of *Pickett v. Green*, 120 Ind. 584, it was decided that where the contract is complete upon its face, a stipulation as to the consideration becomes contractual, and that where there is an express and positive promise to pay a stipulated consideration, the general rule applies, and the consideration expressed can no more be varied by parol than any other part of the contract. See also *Reisterer v. Carpenter*, 124 Ind. 30.

These authorities must now be considered as the law in this state, and in so far as they conflict with the case of *Welz v. Rhodius*, 87 Ind. 1, 44 Am. Rep. 747, that case must be regarded as overruled.

The action of the circuit court in striking out the allegations above referred to, judged by these cases, was not erroneous. The city of Indianapolis, by the ordinance of 1888, granted to the appellee all the rights, privileges, and franchises before that time possessed by the Citizens' Street Railway Company, and in consideration of such grant, the appellee assumed all the obligations and duties resting upon that company.

If the Citizens' Street Railway Company was not bound by the ordinance of 1884 it imposed no duty upon it, and to permit the appellant to allege and prove by parol that the appellee assumed the burdens imposed by that ordinance would be to permit it to prove that the appellee agreed to do something in addition to what is expressed in the contract as an additional consideration for the ordinance of 1888. As we have seen, this cannot be permitted.

Finally, it is contended by the appellant that the appellee is estopped from denying the validity of the assessment for the collection of which this suit is prosecuted, by reason of standing by and making no objection to the improvement until the same was completed.

It has often been held by this court that where the owner of

property liable to assessment for street improvements stands by and makes no objection to improvements which benefit his property, he is estopped from denying the authority by which such improvements were made, and will be held to pay assessments made in aid of the improvement: *City of Lafayette v. Fowler*, 34 Ind. 140; *Hellenkamp v. City of Lafayette*, 30 Ind. 192; *Palmer v. Stumph*, 29 Ind. 329; *Martindale v. Palmer*, 52 Ind. 411.

Where a railroad company is liable to be assessed for such improvements, it will likewise be estopped if it stand by and see the improvements made without objection: *City of New Haven v. Fair Haven etc. R. R. Co.*, 38 Conn. 422; 9 Am. Rep. 399.

We have no doubt that such is the law in all cases where the owner of property liable to be assessed stands by and without objection sees improvements made which benefit his property.

The doctrine annouced in the cases cited, as stated therein, rests, in a measure, upon statutory provisions to the effect that no inquiry shall be made into questions of fact arising prior to the time the contract is entered into for the improvement, it being held that the property-owner, after allowing the improvement to proceed without objection, should be held to have waived all irregularities, if any existed, in the manner of ordering the improvement and letting the contract. Independent of the statutes upon the subject, it is probably true that a property-owner whose property is subject to assessment for street improvement, who sees improvements made which benefit his property, upon the faith that his property shall bear a part of the expense, and does not object to such improvement, would be estopped upon equitable grounds from denying his liability.

In this case, however, the property of the appellee, as we have seen, was not subject to assessment for street improvements.

The city had the right to make the improvement described in the complaint, and the appellee had no right to object thereto.

It was its duty to adjust its track in such a manner as to conform to the street in its improved condition. It does not appear that the appellee omitted to do anything which it had the right or which was its duty to do, or that it did anything which it was not in duty bound to perform. Such a case we do not think falls within the authorities above cited.

In our opinion, the appellee is not estopped from denying its liability for the assessment sought to be recovered in this case.

Impressed with the importance of the questions involved in this case, we have given them each a careful and laborious consideration, and feel warranted in saying that there is no error in the record for which the judgment should be reversed.

Judgment affirmed.

COFFEY, J. A petition for a rehearing has been filed in this case, supported by an able brief, in which it is contended that the opinion heretofore handed down is in conflict with the opinion of the supreme court of the United States in the case of *Sioux City Street R'y Co. v. Sioux City*, 138 U. S. 98, decided sixteen days after the opinion in this case was rendered. We have given the case referred to a careful consideration, and have reached the conclusion that it in no wise conflicts with the opinion heretofore rendered by this court in the case at bar.

It appears from the case cited that the code of the state of Iowa contains the following provision:—

“Sec. 1090. The articles of incorporation, by-laws, rules, and regulations of corporations hereafter organized under the provisions of this title, or whose organizations may be adopted or amended hereunder, shall, at all times, be subject to legislative control, and may be, at any time, altered, abridged, or set aside by law, and every franchise obtained, used, or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good.”

The Sioux City Railway Company obtained a charter from Sioux City to construct a street-railway, binding itself to pave the streets used for that purpose, between the rails. Subsequently, the general assembly of that state passed an act requiring street-railway companies to pave not only between the rails, but also one foot outside the rails. The question for decision in the case involved the power of the state of Iowa to impose this new burden on the street-railway company, the contention of the company being, that its charter constituted a contract between it and the city which could not be impaired by a legislative enactment without its consent. Upon the subject of this contention, the court said:

"Under section 1090 of the Iowa code, the legislature had the power not only to repeal and amend the articles of incorporation of the company, but to impose any conditions upon the enjoyment of its franchise which the general assembly might deem necessary for the public good. The reservation of this power was a condition of the grant. The city council could make no arrangement with the company which would not be subject, under that section, to the superior power of the general assembly. . . . No question can arise as to the impairment of the obligation of a contract, when the company accepted all of its corporate powers subject to the reserved power of the state to modify its charter, and to impose additional burdens upon the enjoyment of its franchise."

It will thus be seen that the question involved in the case cited was quite different from the questions involved in this case. In that case the whole question turned upon the power of the state of Iowa under the powers reserved by the section of its code set out above, while there is no question of reserved powers involved in the case now before us.

That the states or municipalities to which the powers of the state in that respect have been delegated may contract away the right to tax, in a given case, seems to be settled by the decisions of the supreme court of the United States: *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, and authorities cited.

Pursuant to the request contained in the petition for a rehearing, we have again gone over the questions involved in this case, and feel that there is no error in the opinion heretofore handed down.

STREET-RAILWAY CORPORATIONS, RIGHTS, DUTIES, AND OBLIGATIONS OF, WITH RESPECT TO THE STREETS. — *Relative Rights of Street-cars, Pedestrians, and Other Vehicles.* — A street-railway company has no exclusive right to the use of a public street in which its tracks are laid. It has only an equal right with the traveling public to the use of the street. As its cars can run only on the railroad track, when an ordinary vehicle meets a car on the track, the vehicle must give way to the car. But the grant of a franchise to a street-railway company is not intended to exclude ordinary vehicles from using any part of the street: *Redfield's Lead*, Am. R'y Cas. 622; *Shea v. Potrero etc. R. R. Co.*, 44 Cal. 414; *Sixth Ave. R. R. Co. v. Kerr*, 45 Barb. 138; *Gulf City St. R'y Co. v. Galveston City R'y Co.*, 65 Tex. 502; *Hodges v. Baltimore etc. R'y Co.*, 58 Md. 603. A traveler on a city street has the right to drive his vehicle either upon or across the track of a street-railway company. The only limitation of this right is, that he must not unnecessarily interfere with the passage of the cars: *Adolph v. Central Park etc. R. R. Co.*, 65 N. Y. 554; 76 N. Y. 530.

A foot-passenger is entitled to walk on the street-railroad track on a public street, using reasonable care and prudence to avoid injuries. But he is not required to abandon the track in order to avoid possible injuries that may result from the carelessness of the company; and if he is injured by the carelessness of the company while walking on the track, the fact that he might have walked by the side of the track is not contributory negligence on his part: *Shea v. Potrero etc. R. R. Co.*, 44 Cal. 414. In delivering the opinion of the court in this case, Rhodes, J., said: "The tenth instruction requested by the defendant, and refused by the court, is to the effect that if there was a roadway in the street, to the west of the railroad track, upon which the plaintiff might have walked; that if the plaintiff knew of such way, and failed to use it; that if he knew, or had reason to know, that he might meet with danger while walking on the railroad track, and still continued to walk thereon until the injury occurred, — he was guilty of contributory negligence. If this be law, then the public have not the same right to travel along a street, and every part of it, on foot, or in their own vehicles, that a railroad company has to run its cars along the street; for if a person, while walking or driving along the track of a railroad in a street, is injured by a street-car, which was being propelled without any care or prudence, is denied all relief for the sole reason that he might have walked or driven along the side of the railroad track, then such person has not an equal right with the railroad company to the use of one portion of the street. That construction of the law would virtually give the railroad company an exclusive right to the use of the portion of the street upon which its track was laid. The company, however, as we understand the law, has only an equal right with the traveling public to the use of the street."

To What Extent Public Highways. — It must not, however, be supposed that street-railways are in themselves public highways, within the meaning of the ordinary laws regulating the use of highways. They are private roads of their owners, for the accommodation of the public and for the owner's profit, on which no one but the owner may run cars: 1 Rorer on Railways, 3; *Whitaker v. Eighth Ave. R. R. Co.*, 51 N. Y. 295. And a street-railway company has the right to exclude competing vehicles from the habitual and continuous use of its tracks: *Citizens' Coach Co. v. Camden H. R. R. Co.*, 33 N. J. Eq. 267; 36 Am. Rep. 542.

INTEREST OF STREET-RAILWAY COMPANY IN STREET, NATURE OF. — A street-railway company, by laying its rails in the streets of a city under authorization of the municipal authorities, acquires an interest in the soil of the street, and this interest is real property: *Appeal of N. B. & M. R. R. Co.*, 32 Cal. 499; *City of New Haven v. Fair Haven etc. R. R. Co.*, 38 Conn. 422. Such interest may be assessed and taxed as real estate: *Appeal Tax Ct. of Baltimore v. Western Md. R. R. Co.*, 50 Md. 274; it is capable of being enhanced in value by the widening of the street, and may be assessed for that purpose: *Appeal of N. B. & M. R. R. Co.*, 32 Cal. 499; and it may also be assessed for the expense of paving the street: *City of New Haven v. Fair Haven etc. R. R. Co.*, 38 Conn. 422; and for street improvements generally: *Schmidt v. Market St. etc. R. R. Co.*, 90 Cal. 37. The rails laid in the street by a railroad company are the property of the company, and the use of them by another railroad company, either constantly or at irregular intervals, is an appropriation of such property, and illegal: *Jersey City R. R. Co. v. Jersey City H. R. R. Co.*, 20 N. J. Eq. 61. A grant by a municipal corporation to a railway company of a right of way through certain

streets of the municipality, with the right to construct its road thereon, is a franchise which may be mortgaged and pass to the purchaser at a sale under foreclosure: *New Orleans etc. R. R. Co. v. Delamore*, 114 U. S. 501. And where a street-railway company has, by contract with a city, acquired a right in not having a similar railway on certain other streets running parallel with its road, this right is property, in the sense of the eminent-domain law, which may be taken for the use of a new company, where the public necessity so requires: *Metropolitan City R'y Co. v. Chicago etc. R'y Co.*, 87 Ill. 317. But a street-railway company cannot be authorized to appropriate a public street unless such street has been legally established in some mode prescribed by statute: *Burns v. Multnomah R'y Co.*, 15 Fed. Rep. 177.

RIGHT OF WAY. — A street-railway company is entitled to the right of way, or right of the road, on its own tracks, over other vehicles or persons using the street, whether its cars meet them going in opposite directions or overtake them going in the same direction at a rate of speed that would delay the cars: *State v. Foley*, 31 Iowa, 527; *Hegan v. Eighth Ave. R. R. Co.*, 15 N. Y. 380; *Adolph v. Central Park etc. R. R. Co.*, 65 N. Y. 554; 76 N. Y. 530; *Commonwealth v. Temple*, 14 Gray, 69; *Metropolitan R. R. Co. v. Quincy R. R. Co.*, 12 Allen, 262; *Jersey City etc. R. R. Co. v. Jersey City etc. H. R'y Co.*, 20 N. J. Eq. 61. But at street crossings the right of a street-railway company to the street, and its right to the use thereof in respect to other vehicles, are precisely the same as those of such other vehicles: *Buhrens v. Dry Dock etc. R. R. Co.*, 53 Hun, 571.

RIGHT OF ONE STREET-RAILWAY COMPANY TO USE TRACK OF ANOTHER. — One street-railway company has no right to use the tracks of another such company for the transportation of passengers in cars, unless authorized by the latter company or by act of the legislature: *Metropolitan R. R. Co. v. Quincy R. R. Co.*, 12 Allen, 262. But where the legislature has permitted a grant to a street-railway company to run over certain streets, it has the power to grant similar privileges to another company, and to permit the latter to run upon, intersect, or use any portion of the tracks already laid, on condition of making compensation to the first grantee, if the parties cannot agree: *Sixth Ave. R. R. Co. v. Kerr*, 45 Barb. 138; *St. Louis etc. R. R. Co. v. Southern R'y Co.*, 105 Mo. 577. And where a street-railway company accepts the provisions of a city charter providing that any such company shall have the right to run its cars over the track by paying just compensation therefor, such acceptance creates a binding contract: *Union D. R. R. Co. v. Southern R'y Co.*, 105 Mo. 562. Where two corporations are each authorized to construct a street-railway, and power is given to one company to lay down a particular route, on condition that the other shall have the joint use of it, on certain terms, the company for whose benefit this condition is imposed has a vested right to such use, which the other company cannot impair: *Jersey City etc. H. R. R. Co. v. Jersey City etc. R. R. Co.*, 21 N. J. Eq. 550. And where a street-railway company is authorized to construct a railroad in certain streets upon condition that it will permit another company to run its cars on part of the road, upon compensation to be prescribed by the city authorities, it does not acquire an exclusive right to use the route on which it constructs its road, and an injunction will not be granted to restrain a company which has tendered to it the amount prescribed by the city council as compensation, but which it has refused, without proof that the sum tendered was inadequate: *Kinsman St. R. R. Co. v. Broadway & N. St. R. R. Co.*, 36 Ohio St. 239.

Section 499 of the Civil Code of California provides that "two corpora-

tions may be permitted to use the same street, each paying an equal portion for the construction of the track; but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks." A city ordinance granting the right to lay down a railroad track in a street for more than five blocks, where another already exists, is void: *People v. Rich*, 54 Cal. 74; *Omnibus R. R. Co. v. Baldwin*, 57 Cal. 160. The provisions of this section as to the amount of compensation control, in reference to street-railroads, and prevail over the general provisions of the code respecting the assessment of compensation and damages in case of the intersection of one railroad by another: *Pacific R'y Co. v. Wade*, 91 Cal. 449.

One street-railway company cannot prevent another similar company from crossing its track, provided the crossing is effected with as little damage as may be: *Market St. R'y Co. v. Central R'y Co.*, 51 Cal. 583.

RIGHT TO MAINTAIN SWITCHES AND TURN-OUTS. — A street-railway company, authorized by its charter to construct switches, turn-outs, and side-tracks on the streets along the line of its road, has the right to lay down and maintain them, where their use and construction are shown to be necessary; and it can only be liable to adjoining owners of land where it exercises the power granted to it without due care and skill, or in case of some misconduct or negligence on its part: *Carson v. Central R. R. Co.*, 35 Cal. 325. But a street-railway company has no right to unreasonably use a street in a city for storing and switching cars to the special injury of an abutting owner, and if it does so, such owner may maintain an action against it for such injury, although the fee of the street is in the city: *Mahady v. Bushwick R. R. Co.*, 91 N. Y. 148.

RIGHT TO CONSTRUCT RAILWAY IN STREET WITHOUT COMPENSATION TO ABUTTING LAND-OWNERS. — It is now generally held in all the states of the Union, that a street-railway company, duly authorized by municipal or legislative authority, may construct and operate its road upon the streets of a city for the carriage of passengers only, where the grade of the street is not interfered with, without making any additional compensation to the owners of the adjoining land. Such roads, properly constructed and operated, are regarded merely as new and improved methods of transit, and not as imposing any additional burden or servitude upon the land taken for streets and highways: *Finch v. Riverside etc. R'y Co.*, 87 Cal. 597; *Elliott v. Fair Haven & W. R. R. Co.*, 32 Conn. 579; *Randall v. Jacksonville St. R. R. Co.*, 19 Fla. 409; *Eichels v. Evansville St. R'y Co.*, 78 Ind. 261; 41 Am. Rep. 561; *Briggs v. Lewiston etc. R. R. Co.*, 79 Me. 363; 1 Am. St. Rep. 316; *Hiss v. Baltimore etc. R'y Co.*, 52 Md. 242; 36 Am. Rep. 371; *Hodges v. Baltimore etc. R'y Co.*, 58 Md. 603; *Attorney-General v. Metropolitan R. R. Co.*, 125 Mass. 515; 28 Am. Rep. 264; *Commonwealth v. Temple*, 14 Gray, 75; *Grand Rapids etc. R. R. Co. v. Heisel*, 38 Mich. 62; *Hinchman v. Paterson H. R. R. Co.*, 17 N. J. Eq. 75; 86 Am. Dec. 252; *Jersey City etc. R. R. Co. v. Jersey City etc. H. R. R. Co.*, 20 N. J. Eq. 61; *Citizens' Coach Co. v. Camden H. R. R. Co.*, 33 N. J. Eq. 267; 36 Am. Rep. 542; *Cincinnati etc. St. R'y Co. v. Cumminsville*, 14 Ohio St. 523; *Smith v. Street R. R. Co.*, 87 Tenn. 626; *Texas etc. R'y Co. v. Rosedale St. R'y Co.*, 64 Tex. 80; 53 Am. Rep. 739; *Hobart v. Milwaukee City R. R. Co.*, 27 Wis. 194; 9 Am. Rep. 461; 2 Wood on Railroads, 739; and in *Newell v. Minneapolis etc. R'y Co.*, 35 Minn. 112, 59 Am. Rep. 303, it was held that the public authorities of a city may authorize the construction and operation of a railway for passengers in a city street, without compensation to adjacent lot-owners, although the railway is operated by steam-motors, and is used also to transport passengers

from its terminus in the city to a point eighteen miles outside the city; but see *contra*, *Stanley v. City of Davenport*, 54 Iowa, 463; *Street R'y Co. v. Doyle*, 88 Tenn. 747; 17 Am. St. Rep. 933; *Hussner v. Brooklyn City R. R. Co.*, 114 N. Y. 433; 11 Am. St. Rep. 679; *Theobald v. Louisville etc. R'y Co.*, 66 Miss. 279; 14 Am. St. Rep. 564. The use of the street by street-cars propelled by electricity is not the imposition of an additional burden requiring compensation: *Halsey v. Rapid Transit R'y Co.*, 47 N. J. Eq. 380; *Hudson R. Tel. Co. v. Watervliet etc. R. R. Co.*, 56 Hun, 67; *Lockhart v. Craig St. R'y Co.*, 139 Pa. St. 419; *Taggart v. Newport St. R'y Co.*, Sup. Ct. R. I., Jan. 18, 1890. But a street-railway company has no right to lay a horse-railway in a city street solely as a freight-transfer track between two steam-railways, without compensation to the adjoining land-owners: *Carli v. Stillwater St. R'y & T. Co.*, 28 Minn. 373; 41 Am. Rep. 290.

ELEVATED RAILWAY IN STREET. — In New York it is held that the erection and operation of an elevated railway in a street is inconsistent with the use of the street, and as to owners of lots conveyed to them with covenants to keep the streets open forever, is a taking of private property within the meaning of the constitution. Such owners possess an easement of light, air, and access to and from the adjacent streets, of which they cannot be deprived without compensation: *Story v. New York Elevated R. R. Co.*, 90 N. Y. 122; 43 Am. Rep. 146; *Pond v. Metropolitan etc. R'y Co.*, 112 N. Y. 186; 8 Am. St. Rep. 734; *In re Petition of N. Y. etc. R. R. Co.*, 36 Hun, 427; *Glover v. Manhattan R'y Co.*, 66 How. Pr. 77; *Matlage v. New York etc. R'y Co.*, 67 How. Pr. 232.

RIGHT TO ADOPT NEW IMPROVEMENTS. — A street-railway company whose charter is silent as to the kind of rail to be used is not confined to the use of the kind of rail generally adopted and used at the time when its charter was granted, but may adopt another and improved rail, when by so doing it does not impose an additional burden upon the street or upon the city: *Easton etc. R'y Co. v. City of Easton*, 133 Pa. St. 505; 19 Am. St. Rep. 658. A street-railway company may adopt electricity as a motive power instead of horses, and the erection of poles in the street for that purpose is held not to be the imposition of an additional servitude upon the street: *Halsey v. Rapid Transit R'y Co.*, 47 N. J. Eq. 380; *Hudson R. Tel. Co. v. Watervliet etc. R. R. Co.*, 56 Hun, 67; *Lockhart v. Craig St. R'y Co.*, 139 Pa. St. 419; *Taggart v. Newport St. R'y Co.*, Sup. Ct. R. I., Jan. 18, 1890. In the last case a power conferred on a city council to authorize the use of electricity as a motive power was construed to carry with it the power to erect poles on the sidewalks, notwithstanding the act of incorporating the company provided that "said corporation shall not encumber any portion of the street occupied by said tracks." The poles were held not to be encumbrances within the meaning of this prohibition, but as necessary to the successful operation of the road. But in *People ex rel. Third Ave. R. R. Co. v. Newton*, 112 N. Y. 396, it was held that where a street-railway company was authorized to construct and operate a street-railway in the streets of New York City, on condition that "no steam-power be used on any part of the road for propelling cars," the company had no right, without the city's consent, to excavate anew and change the motive power to a subterranean cable propelled by steam-power from a stationary engine on its property outside of the streets.

STREET-RAILWAYS SUBJECT TO MUNICIPAL REGULATION. — The grant to a corporation of the right to transact business as a street-railway affords to it no immunity from any police control on the part of the city to which a

citizen could be subjected: *Frankford etc. R'y Co. v. City of Philadelphia*, 58 Pa. St. 119; *State v. Inhabitants of Trenton*, Sup. Ct. N. J., Nov. 6, 1890. A city ordinance requiring street-railways to report quarterly the number of passengers carried by them is valid, and the officers of the company may be punished for refusal to comply with it: *City of St. Louis v. St. Louis R. R. Co.*, 89 Mo. 44; 58 Am. Rep. 82. A street-railway company is bound to obey a city ordinance requiring it to keep its track watered, so as to lay the dust: *City & S. R'y Co. v. Mayor etc. of Savannah*, 77 Ga. 731; 4 Am. St. Rep. 106. A city ordinance may require a street-railway company to number its cars and to pay an annual license: *Frankford etc. R'y Co. v. City of Philadelphia*, 58 Pa. St. 119. A city council may compel a street-railway company to take up its crescent-rail and put down a tram-rail, where the company's contract with the city stipulated that the most approved rail should be used by it: *Louisville City R'y Co. v. City of Louisville*, 8 Bush, 415.

DUTY OF STREET-RAILWAY COMPANY TO KEEP TRACK IN REPAIR.—The right of a company to construct and operate a railroad in the streets of a city carries with it the obligation to lay its tracks in a proper manner and to keep them in proper repair after they are laid: *Worster v. Forty-second St. etc. R. R. Co.*, 50 N. Y. 203. And if injury results from its failure in either of these respects, it is liable in damages to the person injured: *Cline v. Crescent City R. R. Co.*, 41 La. Ann. 1031; *Worster v. Forty-second St. etc. R. R. Co.*, 50 N. Y. 203. A street-railway company is bound to keep its entire road-bed to the ends of its ties and its crossings in repair, so as not to obstruct travel across it, or longitudinally upon it, and this duty is a continuing one, whether its charter so expressly provides or not: *Railway Co. v. State*, 87 Tenn. 746. Street-railways must not only be constructed, but maintained, upon the most approved plans and by the use of the common and approved means, with a view to the safety of the public traveling in the streets: *Fitts v. Cream City R. R. Co.*, 59 Wis. 323. A cable street-railway company is bound to keep an exact and a continuous inspection of its slot, to see that it does not, by spreading, become a dangerous nuisance: *Keitel v. St. Louis etc. R'y Co.*, 28 Mo. App. 657; *Griveaud v. St. Louis etc. R'y Co.*, 33 Mo. App. 458. Where a street-railway company contracts with a city to keep a portion of the street occupied by its tracks in repair, and the city is compelled to pay damages for injury resulting to a traveler, by reason of the failure to keep such portion of the street in proper repair, the city may recover the amount from the company, or the person injured may sue the company directly: *Mayor etc. of Troy v. Troy etc. R. R. Co.*, 3 Lans. 270; *City of Brooklyn v. Brooklyn City R. R. Co.*, 47 N. Y. 475; *McMahon v. Second Ave. R. R. Co.*, 75 N. Y. 231. But in *Fields v. Hartford etc. R. R. Co.*, 54 Conn. 9, it was held that the company was entitled, before being liable to suit, to written notice of the injury, under a statute providing that no action for an injury from a defective highway shall be maintained against any town, city, corporation, or borough, unless written notice of such injury, and of its nature, and the place of its occurrence, shall be given within sixty days.

DUTY OF STREET-RAILWAY COMPANY TO REMOVE SNOW FROM ITS TRACKS.—A street-railway company may be compelled to remove the snow from its tracks in the manner to be designated by the superintendent of streets, or other officer having charge of the condition or repair of the streets: *Union R'y Co. v. Mayor etc. of Cambridge*, 11 Allen, 287. In clearing the snow from its tracks, it is bound to dispose of it so as not to interfere unnecessarily with the safety and convenience of persons using the street; and in case of extraordinary snow-falls, it must use extraordinary efforts to that end: *Buen*

v. *Detroit City R'y Co.*, 54 Mich. 496; 52 Am. Rep. 822. It has a right to remove the snow from its track and put it upon another part of the street, provided it does so in a usual and reasonable manner. But it has no right to throw it into the gutter, or to pile it up in the street in such a way as to interfere with the flow of the water in the street: *Short v. Baltimore etc. R'y Co.*, 50 Md. 73; 33 Am. Rep. 298.

DUTY TO EXERCISE CARE TO AVOID ACCIDENTS. — A street-railway company, in running its cars in a public street, must exercise such care and precaution, for the purpose of avoiding accidents to person or property, as a reasonable prudence would suggest: *Shea v. Potrero etc. R. R. Co.*, 44 Cal. 414. Where its cars are drawn by horses, it is not bound to the same degree of care required of carriers by steam. It is only bound to the same degree of care as drivers of other vehicles. It is only bound to use methods of attaching its horses to its cars that are in general use and found to be usually adequate and safe. It is not required to use the best methods that human skill and ingenuity have devised: *Unger v. Forty-second Street etc. R. R. Co.*, 51 N. Y. 497. Nor is the driver of such a car bound to regulate his speed to such a rate as may be necessary to avoid harm to persons crossing the street in an unreasonable and improper manner: *Meyer v. Lyndell R'y Co.*, 6 Mo. App. 27. But a street-railway company is bound to exercise the highest degree of diligence and care to discover and avoid injury to young children on its track: *Galveston City R. R. Co. v. Hewitt*, 67 Tex. 473; 60 Am. Rep. 32. And a cable company is bound to know that men, women, and children have equal right to the use of the street, and will be upon it, and its servants are bound to be on the lookout and to take reasonable means to avoid accidents: *Winters v. Kansas etc. R'y Co.*, 99 Mo. 509; 17 Am. St. Rep. 591. A street-railway company is not relieved from liability by the fact that its driver, who is also conductor, was engaged in taking fares and making change when an accident happened. The duty which it and its employees owe to the public is paramount to that which they owe to each other: *Anderson v. Minneapolis St. R'y Co.*, 42 Minn. 490; 18 Am. St. Rep. 525.

OBLIGATION TO PAVE STREETS. — The obligations of street-railways to pave or keep in repair a certain part of the streets on which their tracks are laid are generally imposed by their charters, or agreed upon by contract with the authorities. A street-railway company which has assumed an obligation to repair a certain part of the street cannot be compelled to improve or pay for the improvement of that part of the street: *Chicago v. Sheldon*, 9 Wall. 50; *Coast Line R. R. Co. v. Mayor etc. of Savannah*, 30 Fed. Rep. 646; *State ex rel. v. Corrigan etc. St. R'y Co.*, 85 Mo. 263; 55 Am. Rep. 361. A street-railway company which is bound by its charter to pave the streets "in and about the rails" is bound to pave the space between the rails and adjoining them, and between the two tracks, where it has double tracks on the street: *Mayor etc. of New York v. Second Ave. R. R. Co.*, 31 Hun, 241. But where a company has been relieved by statute from repairing the street outside of its track, it cannot be required to pave the street between its double tracks: *City of St. Louis v. St. Louis R. R. Co.*, 89 Mo. 44; 58 Am. Rep. 82. In *District of Columbia v. Washington etc. R. R. Co.*, 4 Mackey, 214, it was held that where a street-railway company's charter required it to keep its tracks and the space between the rails and two feet outside well paved and in good repairs, it could be required to construct a pavement where one did not exist before its road was built, and to construct such kind of pavement as the authorities should direct. In Iowa, it is held that an ordinance of a

city council authorizing a company to lay a railway in a street on condition that it should pave between the rails is subject to the provisions of section 1090 of the code of that state, which reserves to the legislature the power to repeal and amend the acts of incorporation of a company, and to impose any conditions upon the enjoyment of its franchise which the general assembly may deem necessary for the public good, and that such ordinance, although accepted by the company, does not constitute a contract between the company and the city, the obligation of which is impaired by laying a tax upon the company, for paving the space of one foot outside the rail, imposed by an act of the legislature: *Sioux City St. R'y Co. v. Sioux City*, 138 U. S. 98; 78 Iowa, 377.

CASES
IN THE
SUPREME COURT
OF
IOWA.

MATT v. IOWA MUTUAL AID ASSOCIATION.

[81 IOWA, 135.]

INSURANCE CERTIFICATE—TIME WITHIN WHICH ACTION MAY BE BROUGHT THEREON. — Though a clause in a certificate of insurance declares that no action shall be maintained for any cause connected therewith unless such action is commenced within six months after the happening of the death on account of which the action is brought, the limitation does not commence to run until the cause of action has matured so that suit can be maintained thereon.

VENUE, CONTRACT LIMITING—INSURANCE CERTIFICATE LIMITING THE PLACE WHERE ACTION CAN BE BROUGHT thereon to the county in which the principal office of the insurer is situated is, as to such limitation, void, and cannot prevent the maintenance of such action in any court of competent jurisdiction.

ACTION to compel defendant to levy an assessment based upon the death of Andreas Matt and to pay the proceeds thereof to plaintiff. The trial court sustained a demurrer, on the ground that it appeared from the petition that the action was not brought within six months after the death of Andreas, nor in the county of Wapello, as provided in the certificate of insurance sued upon.

Murdock and Murphy, and John Larkin, for the appellant.

R. E. Price, and McNett and Tisdale, for the appellee.

GIVEN, J. The clause in the policy out of which these questions arise is as follows: "2. No action of any kind shall be maintained upon this certificate, or against the association, for any cause connected therewith, except in the county of Wapello, where its principal office is situated; nor unless sat-

isfactory proofs are furnished the association within sixty days; nor unless such action is commenced within six months after the happening of the death on account of which the action is brought, — any statute of limitation or law to the contrary notwithstanding.” The appellee contends that under this clause plaintiff’s right to sue was barred after six months from the happening of the death. The appellant contends that her right to sue was not barred until six months after the time at which suit could be brought. If appellee’s position is correct, then this action was barred, and the demurrer was properly sustained; otherwise not. This precise question was before this court in *McConnell v. Iowa Mut. Aid Ass’n*, 79 Iowa, 757, upon a certificate of insurance similar if not identical with this, wherein it was held that the limitation did not commence to run until the cause of action matured. This opinion was carefully reconsidered on a petition for rehearing, and adhered to.

2. The other question discussed is fully, and to our mind well, answered in May on Insurance, sec. 490, and authorities cited. The author there says: “A provision in the charter defining the court in which suit may be brought on certain conditions is valid, if the conditions are strictly complied with. If not, suit may be brought in any court having jurisdiction. A condition in the contract limiting the venue or place where the action shall be brought is invalid. There is an obvious distinction between a stipulation by contract as to the time when a right of action shall accrue or be lost, on the one hand, and a stipulation as to the forum before which, and the proceedings by which, an action shall be commenced and prosecuted, on the other. The one is a condition annexed to the acquisition and continuance of a legal right, and depends on contract, and the acts of the parties; the other is a stipulation concerning the remedy, which is created and regulated by law. The time within which money shall be paid is matter of contract, depending on the will and acts of the parties; but in case of breach, the tribunal before which a remedy is to be sought, the means and processes by which it is to be conducted, affect the remedy, and are created and regulated by law. The remedy does not depend on contract, but upon law, generally the *lex fori*, regardless of the *lex loci contractus*, which regulates the construction and legal effect of the contract. It is, moreover, a well-settled maxim, that parties cannot, by their consent, give jurisdiction to courts,

and it would seem to follow that parties cannot take away jurisdiction where the law has given it; and mutual and stock companies are equally under the disability." In *Portage Co. Mut. Ins. Co. v. Stukey*, 18 Ohio, 455, referred to by appellee, the company was chartered by a special act that fixed the place at which suits must be brought. That decision is based upon the charter, and not upon contract. *Dutton v. Vermont Mut. Fire Ins. Co.*, 17 Vt. 369, is not in point. The question in that case was as to limitation of time, and not of place. The provisions of our code are clearly decisive of this question. The petition shows that the defendant is an insurance company; that this contract of insurance was made in Clayton County; and that the assured died in that county. Section 2584 of the code provides that insurance companies may be sued in any county in which the contract is made, or in which the loss occurs, thereby making the county where such contracts are made, or where such losses occur, the place where the contract is to be performed. The clause of this certificate limiting the place of bringing actions to Wapello county is contrary to the spirit, if not the letter, of our statutes, and not sanctioned by the law.

Other points stated in the demurrer were not argued, and therefore not noticed. Our conclusion is, that the demurrer should be overruled. The judgment of the district court is therefore reversed.

INSURANCE — TIME WITHIN WHICH ACTION MAY BE BROUGHT ON THE POLICY. — A stipulation in a policy that suit thereon shall not be instituted except within a period less than that fixed by the statute of limitations is valid and binding upon the parties: *Moore v. State Ins. Co.*, 72 Iowa, 414; *Ghio v. Western Assur. Co.*, 65 Miss. 532; *Muse v. London Assurance Co.*, 108 N. C. 240; *Suggs v. Travelers Ins. Co.*, 71 Tex. 579; *Virginia etc. Ins. Co. v. Aiken*, 82 Va. 424; *Virginia etc. Ins. Co. v. Wells*, 83 Va. 736. The limitation does not begin to run, however, until the cause of action has actually matured, so that suit could be maintained upon the policy: *Case v. Sun Ins. Co.*, 83 Cal. 473; *McConnell v. Iowa Mut. Aid Ass'n*, 79 Iowa, 757; *Mayor etc. of New York v. Hamilton F. Ins. Co.*, 39 N. Y. 45; 100 Am. Dec. 400; *Steen v. Niagara F. Ins. Co.*, 89 N. Y. 315; 42 Am. Rep. 297; *Chandler v. St. Paul etc. Ins. Co.*, 21 Minn. 85; 18 Am. Rep. 385; note to *Chambers v. Atlas Ins. Co.*, 50 Am. Rep. 3. The last day of the time within which the action should be brought under the conditions named in the policy being Sunday, suit may be instituted upon the day following: *Owen v. Howard Ins. Co.*, 87 Ky. 572. The stipulations in a policy with respect to the time within which an action must be brought thereon may be waived by the company: *National Ins. Co. v. Brown*, 128 Pa. St. 386; *Allemania F. Ins. Co. v. Peck*, 133 Ill. 220; 23 Am. St. Rep. 610, and note; *Hocking v. Howard Ins. Co.*, 130 Pa. St. 171. An action upon an insurance policy is premature when instituted prior to the

expiration of the time allowed the company within which to make payment: *Cowan v. Phenix Ins. Co.*, 78 Cal. 181; *Vore v. Hawkeye Ins. Co.*, 76 Iowa, 548.

INSURANCE — ACTION ON POLICY — PLACE OF TRIAL. — An action on a policy of life insurance is triable in the county in which the insured resided and in which his death occurred: *Bruil v. Northwestern etc. Ass'n*, 72 Wis. 430.

SMITH v. EALS.

[81 IOWA, 235.]

WRIT OF REPLEVIN, SERVICE OF. — It is not material whether a writ of replevin is served by a constable or the sheriff.

ALTERATION OF INSTRUMENTS — BURDEN OF PROOF. — If it appears that certain drafts have been materially altered, their holders must assume the burden of proving that they purchased in good faith and without notice of the alteration.

REPLEVIN IS A PROPER REMEDY FOR THE RECOVERY OF DRAFTS executed by the plaintiff, and which have become void by reason of their subsequent fraudulent alteration.

REPLEVIN to recover two accepted drafts. Verdict and judgment for plaintiff; defendant appealed.

Flick and Thomas, for the appellants.

Crum and Haddock, and J. E. Huston, for the appellee.

ROTHROCK, C. J. 1. The drafts in question were drawn by Hall & Co., by Thomas E. Hall, upon the plaintiff, and payable to the order of Thomas E. Hall, and accepted by the plaintiff at the time they were drawn. Both instruments were dated January 8, 1889, and one was payable September 1, 1889, and the other December 1, 1889. After the instruments became due, they were sent by H. D. Booge & Co. of Topeka, Kansas, to the defendant Eals, a banker at Clearfield, Iowa, and the plaintiff commenced this action, and replevied the acceptances, upon the general ground, stated in the petition, that he was the owner, and entitled to the possession of them. The defendant Eals answered, disclaiming any interest in the subject of the action. Booge & Co. answered, claiming that the plaintiff, by fraud and misrepresentation, induced Booge & Co. to send the acceptances to this state for the purpose of instituting this action, and that the jurisdiction of the cause was therefore obtained by fraud. They further set forth that they were "purchasers for value of the instruments in suit before maturity." The plaintiff, by reply, denied that he was in any way instrumental in causing the notes to be sent to

this state; and he further replied as follows: "The plaintiff further states that said instruments, now purporting to be accepted time drafts, are forgeries, and are not the instruments as executed, and have been added to and materially changed since execution."

It appears from the return on the writ of replevin that it was served by a constable. The defendants, by motion, demanded an order for the return of the notes to them, because the writ was not served by the sheriff. The motion was overruled. We do not discover any error in this ruling. The writ had been properly served, and it does not appear to us to be a material question whether it was served by a sheriff or by a constable.

2. The question as to the alleged fraudulent acts of the plaintiff in procuring the instruments to be sent into this state ought not to be considered as in the case. There was no evidence to sustain that averment of the answer, and the court could have very properly directed the jury to find for the plaintiff on that issue. We do not determine whether this averment of the answer would be any defense to the action, if proved.

3. It appears without conflict, in the evidence, that the body of the drafts was in this form: "Pay to the order of Thomas E. Hall four hundred dollars, with exchange —, value received, and charge to the account of." The words before and after the blank were printed, and the instruments were complete and perfect in form and meaning without words being filled in the blank. But the blank was filled with the words following: "And ten per cent interest after date, if not paid when due." There was not space to write these words in the blank, and part of them are interlined. The evidence shows, beyond all question, that these words were added to and written in the instruments after they were accepted by the plaintiff, and without his knowledge or consent. There is no question but what this was a material alteration of the acceptances, and rendered them void as between the plaintiff and Hall. The only real question in the case is, whether, under the evidence, Booge & Co. are entitled to recover on the acceptances. There is no evidence showing when or by whom the instruments were altered. They were indorsed by Hall in blank. The presumption is, that they were purchased by Booge & Co. for value, and without notice of any defense that might be interposed thereto. But when it was shown that they had been mate-

rially altered, this presumption was rebutted, and it was incumbent on Booge & Co. to show that they purchased them in good faith, and without notice of the forgery: *Robinson v. Reed*, 46 Iowa, 219; *Scofield v. Ford*, 56 Iowa, 370; 1 Daniel on Negotiable Instruments, sec. 815; 2 Parsons on Notes and Bills, 576, and authorities cited. We do not determine that the drafts are absolutely void in the hands of Booge & Co., because it is unnecessary to determine that question in this case. No attempt was made by Booge & Co. to prove that they were *bona fide* holders of the instruments.

4. It is claimed by counsel for appellants that replevin is not the proper remedy for the plaintiff. If the instruments are void by reason of the forgery, it is the plaintiff's right to recover possession of them: *Savery v. Hays*, 20 Iowa, 25; 89 Am. Dec. 511; *Sigler v. Hidy*, 56 Iowa, 504.

We have thus disposed of all the questions in the case without a review of the charge of the court to the jury. There is really no conflict in the evidence. The cause turns upon the law applicable to undisputed facts, and it is not necessary to discuss questions raised as to the correctness of the instructions. The judgment of the district court will be affirmed.

ALTERATION OF INSTRUMENTS — BURDEN OF PROOF. — Where there has been a material alteration of a negotiable paper, the burden is upon the holder to explain such alteration: *Rodriguez v. Haynes*, 76 Tex. 225; *Estate of Nagle*, 134 Pa. St. 31; 19 Am. St. Rep. 669, and note; *Elgin v. Hall*, 82 Va. 680. As to burden of proof in the alteration of negotiable instruments, see extended note to *Neil v. Case*, 37 Am. Rep. 260-264. Compare *Hagan v. Merchants' etc. Ins. Co.*, 81 Iowa, 321; *post*, p. 493.

REPLEVIN — NEGOTIABLE INSTRUMENTS. — Replevin may be maintained by the maker to recover the possession of a promissory note which has been paid: *Savery v. Hays*, 20 Iowa, 25; 89 Am. Dec. 511, and note; *Shipley v. Reasoner*, 80 Iowa, 548; *Bush v. Groomes*, 125 Ind. 14.

PAINTER v. POLK COUNTY.

[81 IOWA, 242.]

MISTAKE OF LAW, RECOVERY OF MONEYS PAID UNDER. — Fees paid by a county to a public officer, under a mistaken belief on his part and that of the county that he was entitled to them by law, cannot be recovered by the county, for the reason that its mistake was one of law, on account of which no recovery can be had.

C. P. Holmes, for the appellant.

Cummins and Wright, for the appellee.

GIVEN, J. 1. The agreed statement of facts is as follows: "It is agreed and stipulated between the parties hereto that during the years 1884, 1885, 1886, and 1887, the plaintiff was the sheriff of Polk County, duly elected and qualified; that during these years he attended with prisoners before the court in this county; that for such service he presented his bills to the board of supervisors of defendant county, copies of which said bills, so far as material, are hereto attached and made a part hereof; that during said years the plaintiff also presented to said board of supervisors bills for the commitment and discharges of prisoners in cases where such prisoners were not actually committed and discharged from the jail, as shown by the records kept by the jailer of the persons received into and discharged from said jail, a copy of which said bill is hereto attached; that the defendant has paid plaintiff for and on account of such attendance the sum of \$331, and on account of such commitments and discharges the sum of \$17, said bills having been duly allowed, and warrants issued and paid, in the ordinary course of business; that said bills were presented and allowed upon the belief that the defendant county was legally liable to the plaintiff for services in attending with prisoners before the court, and was in the same manner liable for such commitments and discharges. There is now in the hands of the defendant, and owing plaintiff, upon settlements of other accounts with the defendant, the sum of \$348 which is now retained by the defendant, awaiting the determination of the question as to whether or not defendant is entitled to recover of plaintiff the amount paid to him upon said bills for services for attending before the court with a prisoner, and for commitment and discharge of prisoners not actually committed and discharged from custody in jail."

The mistake as to the law with respect to fees for attendance evidently arose from the fact that, under the code of

1873, sheriffs were allowed for "attendance with a person before the court or judge when required, for each day one dollar." This was changed by chapter 115, acts of eighteenth general assembly, the word "court" being omitted. In *Painter v. Polk Co.*, 70 Iowa, 596, it was held that, under this statute as changed, sheriffs were not entitled to fees for attending before a court with a prisoner. The \$331 fees for attendance in question were paid after the change in the law, and before the announcement of the opinion in *Painter v. Polk Co.*, 70 Iowa, 596, and the only question with respect thereto is, whether, having been paid under a mutual mistake as to the law, the defendant is entitled to recover it back.

2. Appellant admits "the general proposition that payments made under misapprehension or mistake of law cannot ordinarily be recovered back," but insists that it does not apply to the payments of fees or salary made by public officers to public officers. To permit persons who have made a payment to plead ignorance of the law as a ground for recovering it back would be counter to that indispensable principle to civil government, that all persons of sufficient age and sound mind are presumed to know the law, and would go far towards unsettling business transactions, and encouraging litigation. We discern no reason why the rule should be different in this case from what it would be between private individuals. The necessities for the rule are the same. *Gilman v. Des Moines Valley R'y Co.*, 40 Iowa, 200, and *Hawkeye Ins. Co. v. Brainard*, 72 Iowa, 130, do not support appellant's position. In those cases it was held to be against public policy for an officer to contract for a different fee than that allowed by law. That was exclusively a question of public policy. In *Palo Alto Co. v. Burlingame*, 71 Iowa, 201, it was not a question of recovering back a payment made, but whether the unauthorized act of the board allowing the clerk to retain fees to which he was not entitled was a good defense to an action for their recovery.

Cases are cited in support of the position, that when a party has paid money upon a consideration which is illegal, the law implies a promise on the part of the person to whom or to whose use it is paid to refund. There is no question of illegal consideration before us. If there were, our inquiry would then be, whether the courts would afford any relief to either party. In *Badeau v. United States*, 130 U. S. 439, the plaintiff was seeking to recover his salary as a retired army

officer, while he at the same time had been accepting pay in the diplomatic service. The United States denied his right to recover, and sought to recover, by way of counterclaim, a large sum which it was claimed had been erroneously paid him without authority of law as his salary as an army officer, during which time he was not in fact in the army; and it was held that the government could not recover money paid under the mistaken belief that there was a legal liability therefor.

In *Kraft v. City of Keokuk*, 14 Iowa, 86, the plaintiff sought to recover back money paid by him to defendant for a license, under a law which was afterwards held to be unconstitutional. This court held that he could not recover the money so paid, because paid under a mistake of law. The court says: "The law does not permit him to allege his ignorance, and make it the foundation of his right to recover back the money. The principle upon which courts refuse to relieve mistakes in law is, we suppose, the fact that the law presumes every man to be cognizant, not only of what are its provisions in force, but how far they are valid and operative."

The appellant contends that \$160 of the amount paid for attendance, and \$17 paid for commitments and discharges, were paid under mistake of fact, and not of law. The agreed statement of facts does not support this claim. It not only fails to show that the payments were made under a mistake of fact, but expressly states that the claims were presented and allowed upon the belief that the defendant county was legally liable to the plaintiff.

The judgment of the district court is affirmed.

MISTAKE OF LAW, RECOVERY OF MONEY PAID UNDER. — Money paid under a mistake of law cannot be recovered back: *Norton v. Marden*, 15 Me. 45; 32 Am. Dec. 132; *Mowatt v. Wright*, 1 Wend. 355; 19 Am. Dec. 508, and note; *Champlin v. Laytin*, 18 Wend. 407; 31 Am. Dec. 382; *Mayor v. Lefferman*, 4 Gill, 145; 45 Am. Dec. 145. But see *Culbreath v. Culbreath*, 7 Ga. 64; 50 Am. Dec. 375, and note; *Hughes v. Pealer*, 80 Mich. 540.

DODD v. SCOTT.

[81 IOWA, 319.]

RES JUDICATA — HOMESTEAD. — AFTER A JUDGMENT OF FORECLOSURE against a husband, he cannot, in defense of an action by the purchaser under such foreclosure, assert that the property was a homestead when the former judgment was entered; that his wife was not a party to the judgment and was not affected thereby; and that he has a right of possession acquired from the homestead right of his wife. Whatever right the husband had because of the wife's homestead right was available as a defense to the foreclosure suit.

ACTION of forcible entry and detainer, in which the plaintiff relied on the foreclosure of a contract of purchase made by him to the defendant, and a sale and deed pursuant to the foreclosure. Neither in this action nor in the foreclosure suit was the wife of the defendant a party. The defendant answered, that before the beginning of the suit to foreclose he was a married man, and with his wife occupied the premises sued for as a homestead; that his wife was not a party to the foreclosure; and that he had a right and possession in and to the real estate acquired by and from the homestead right of his wife. To this answer a demurrer was interposed, but it was overruled, and the plaintiff appealed.

Hayes and Schuyler, and B. F. Thomas, for the appellant.

No appearance for the appellee.

GRANGER, J. The case must be reversed, and as we are unaided by brief from appellee, we limit our consideration to a single question: See *McKern v. Albia*, 69 Iowa, 447; *Deeds v. Chicago etc. R'y Co.*, 69 Iowa, 164; *Gilfeather v. Council Bluffs*, 69 Iowa, 310.

A point urged in argument by the appellant is, that the husband, who was a party to the foreclosure proceeding, cannot in this case set up the homestead right of the wife as a defense, and it seems difficult to gainsay the proposition. With the amendment the plea appears to be one personal to the defendant; that is, he does not seek to defend for his wife, but for himself, because of a "right and possession" acquired "through the homestead right of the wife." Being a party to the foreclosure suit, if he had a homestead right available to him as a defense therein, he must interpose it, or the right is lost. Now, the wife was not a party to that proceeding, and any right he had available to him because of the wife's homestead right (if there could be any) was just as available

for defense in that suit as in this, and just as available then as any other right he had. We must assume, then, that all rights personal to the defendant have been adjudicated or waived, and that under the claim of the demurrer, because of the wife not being a party to this suit, no claims based on her homestead rights are available as a defense. With this holding, no question of title is involved in the issues, and the cause should be remanded to the justice for trial.

Reversed.

JUDGMENT — CONCLUSIVENESS OF. — When a party might have presented a defense and did not do so, the judgment obtained against him is conclusive as to such defense, and it cannot be set up in a subsequent proceeding: *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95, and note; *Hobby v. Bunch*, 83 Ga. 1; 20 Am. St. Rep. 301, and note. See note to *Gould v. Sternburg*, 15 Am. St. Rep. 142; *Huntley v. Holt*, 59 Conn. 102; 21 Am. St. Rep. 71, and note. But see *Sloan v. Price*, 84 Ga. 171; 20 Am. St. Rep. 354, and note.

HAGAN v. MERCHANTS' AND BANKERS' INS. CO.

[81 IOWA, 321.]

PLEADING. — THE EXECUTION OF A POLICY OF INSURANCE IS NOT PUT IN ISSUE by an answer denying that the policy as set out in the complaint is the policy issued by the defendants, "for that the same has been changed and altered, without their knowledge and consent, since its delivery," and further specifying the respects in which it has been so altered. Such policy is therefore receivable in evidence on behalf of the plaintiff without proving its execution, and without evidence concerning the alleged alterations.

EVIDENCE — BURDEN OF PROOF. — IF A WRITING APPEARS TO HAVE BEEN ALTERED, but there is nothing to show when or by whom such alteration was made, the party claiming that it was made after delivery and without authority must assume the burden of proof.

INSURANCE CORPORATION IS BOUND BY THE KNOWLEDGE OBTAINED BY ITS AGENTS.

INSURANCE, NOTICE OF CONCURRENT. — IF THE AGENT OF THE INSURER KNOWS when he receives the application for insurance that the assured is desiring and applying for concurrent insurance in excess of that permitted by the policy, this knowledge is imputed to the insurer, and precludes it from maintaining a defense founded upon the fact that additional insurance was finally obtained.

INSURANCE. — PAROL EVIDENCE that proof of loss was prepared and sent to the insurer is admissible, and if there is no issue as to the form or sufficiency of the notice or proof, there is no necessity of evidence of the contents of either, and the admission of an alleged copy cannot prejudice the insurer nor afford him any ground for reversal.

INSURANCE. — COUNTERCLAIM BASED UPON A PREMIUM NOTE is not sustainable when the promise in the note is to pay a designated sum "in

such portions and at such times as the directors of such company, agreeably to their act of incorporation and by-laws, may require," unless the directors have declared such notes or some portion thereof due and payable.

ACTION to recover upon a policy of insurance against loss by fire. The policy and a copy of the application were annexed to and made parts of a complaint. In the application, the question asked, of what materials the roof is, is answered, "iron and shingle." In the policy the description is, "iron roof and shingle building." The answer denied that the policy set out was the policy issued by defendants, "for that the same has been changed and altered, without their knowledge or consent, since its delivery"; that the words "and shingle," in the application and policy, were added therein without their knowledge, consent, or authority, and after the delivery of the policy to the plaintiff, and alleged that the plaintiff had procured concurrent insurance in excess of the sum for which permission was given in the policy to which the defendant had never consented in writing or otherwise. In his reply to defendant's answer, plaintiff alleged "that if any change was made in such policy or application as indorsed thereon, which plaintiff does not admit, the same was changed before such policy and application came into plaintiff's hands or was delivered to plaintiff, and plaintiff is not chargeable therewith; but he denies such change or alteration was made as charged in answer and amendments"; that defendant had full knowledge at the time the insurance was applied for of the amount of insurance plaintiff was taking out, and the companies and amounts in each. Verdict and judgment for plaintiff. Defendant appealed.

Baker and Haskins, for the appellant.

Woolson and Babb, for the appellee.

GIVEN, J. 1. On the trial, plaintiff offered in evidence the policy, and copy of application attached, to which defendant objected, on the ground that it was apparent on the face of the instruments that they had been changed, wherefore the burden was on plaintiff to account for the change before he could introduce the instruments in evidence, and also upon the ground that plaintiff confessed the change in his reply, and had not offered evidence tending to avoid it. This objection was overruled. The defendant asked an instruction to the effect that if the jury found that there was ground for

suspicion on the face of the instruments that the policy had been altered as alleged, then the burden was upon the party offering it in evidence to show "when such alleged alteration was performed, by whom, and the intent with which done." This instruction was refused, and one given that "the burden of establishing that the words were added to one or both of the places alleged after delivery of the policy rests upon the defendant." The overruling of said objection, the refusal to instruct as asked, and the instruction given, are assigned as error.

The books are full of diverse decisions as to whether, on the production of a written instrument which obviously has been altered, it is incumbent upon the party offering it in evidence to explain its appearance. Some hold that an alteration apparent on the face of the writing raises no presumption either way; some that it raises a presumption against the writing, and therefore requires some explanation to make it admissible; others hold that it raises such presumption only when the apparent alteration is suspicious; and yet others, that it is presumed, in the absence of explanation, that the alteration had been made before delivery. The authorities are so numerous that we refrain from citing any, but refer to the American and English Encyclopædia of Law, under "Alteration of Instruments," where many of the authorities sustaining these different views are cited. This question was incidentally noticed, but not passed upon, in *Jones v. Ireland*, 4 Iowa, 69; *Ault v. Fleming*, 7 Iowa, 143; *Wilson v. Harris*, 35 Iowa, 507; and *Wing v. Stewart*, 68 Iowa, 13. These cases were disposed of upon other grounds, and the question before us has never been directly passed upon by this court. The issues involved in this defense are, whether the policy was altered as alleged, and if so, whether after delivery to plaintiff, and without authority of the defendant. In *Jones v. Ireland*, 4 Iowa, 69, it was held to be a question of fact for the jury whether there had been an alteration as alleged. The instrument was certainly competent evidence as bearing upon this question, and was therefore proper to go to the jury; but the contention is, whether the plaintiff was entitled to offer it without explanatory proofs.

If the appearance of the instrument or other testimony tended to support the charge of alteration, it was the duty of the court to submit the issue to the jury; but if the instrument or other proofs did not so tend, then the issue should

be withheld, as in any other case where there is no testimony tending to support the allegation. No complaint is made of the action of the court in submitting the issue, and we may assume, therefore, that the appearance of the instrument does tend to support the charge of alteration. The questions as to whether there were alterations, and if so, whether fraudulent, were fairly before the jury, and the instruments were competent evidence upon those issues. Question is made whether it was necessary for the plaintiff to offer the policy in support of his action. We think, upon the pleadings, it was not. The execution of the paper was not denied, only in the sense that it was not the policy issued by the defendant, "for that the same has been changed and altered, without their knowledge or consent, since its delivery." This is not such a denial of the execution of the instrument as is contemplated in section 2730 of the code. It is contended that the plaintiff, in his reply, confessed the alteration, and pleaded in avoidance that it was altered before delivery. The reply will not admit of such a construction. It expressly denies alteration; and in the sentence wherein it is claimed an avoidance is pleaded, it is said that plaintiff does not admit that any change was made. If this question rested upon the pleadings alone, we would say, under the general rule, that the burden was upon the defendant to establish his allegations that the instruments were altered after delivery, and without its authority. We think there was no prejudicial error in admitting the instruments over defendant's objections; for if they had not been introduced by the plaintiff, they certainly would have been introduced by the defendant in support of its defense of alteration.

2. The instrument being properly before the jury, the more important question is, upon which party the burden rested of explaining the apparent alteration. Determined by the pleadings and the general rule, we have seen that the burden was upon the defendant; but if we are to presume from the fact of alteration that it was fraudulently made, then the burden is upon the plaintiff to rebut this presumption; but if no presumption arises, or if the alteration is presumed to have been made before delivery, then the burden is upon the defendant. The rule that an alteration apparent on the face of the writing raises no presumption either way is, in our opinion, well supported by reason and authority, and in harmony with the rule that the law does not presume guilt.

If the instrument shows upon its face, as it is possible it may, that the alteration was fraudulent, then it proves more than the mere fact of alteration; but when the fact of alteration alone appears from it, and it is silent as to the time or authority by which it was made, there is no evidence upon which to base the presumption that it was fraudulently done. To presume against the writing, or that the alteration was before delivery, is to indulge in presumptions without evidence to support them. The alteration is not against the writing, unless done after delivery, without authority. Apparent alterations are often made before delivery, and sometimes alterations are made after, with or without authority. Hence the mere fact of alteration furnishes no evidence as to when it was made, nor whether made by authority or not. If the alteration was not apparent upon inspection of the instrument, the burden of proof that it was altered would be upon the party who alleged it. If either of two opposite presumptions are equally inferable from an established fact, it cannot be said that that fact tends to prove either. If from the fact of alteration it may not be presumed that it was made after delivery, and without authority, then surely the burden of so proving is upon him who alleges it. Having determined that an alteration apparent on the face of the writing raises no presumption that it was made after delivery, and without authority, it follows, from what we have said as to the pleadings, that the burden was not upon the plaintiff to explain the alteration, but upon the defendant to prove its allegations that the alterations were made after delivery, and without authority.

3. At the time of making this application, the plaintiff had no other insurance. The application was made to one Tam, agent of defendant, who prepared it for signature, and at the same time solicited applications in other companies in sums which, in the aggregate, exceeded twenty-five hundred dollars concurrent insurance, for which permission is given in the policy. All the applications but one were given to Tam at the same time, that one not being given then because Tam had no blank form. It was given a few days later. One of these applications was rejected by the company, and afterwards placed by Tam in another company, through its agent. There is no question but at the time of taking this application defendant's agent knew that plaintiff was desiring and applying for concurrent insurance in excess of two thousand

five hundred dollars. Defendant's contention is, that the plaintiff also knew that fact, and that knowledge on the part of the agent will not excuse the plaintiff's intentional fraud, even though the agent participated therein. That the defendant is bound by the knowledge obtained by its agents, is fully sustained in *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa, 253; *Jordan v. State Ins. Co.*, 64 Iowa, 216; *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa, 600. In each of these cases the assured possessed the same knowledge as the agent. The company, being charged with the knowledge of its agent, must be considered as having knowledge of the amount of insurance applied for, and having issued this policy with such knowledge, will be deemed to have waived the condition against concurrent insurance beyond the sum named. The cases last cited fully answer this contention.

4. Under the uncontradicted testimony, there is no doubt but that notice and proofs of loss, verified by plaintiff, were sent to defendant by registered letter, and duly received. The plaintiff, having testified that the original was not in his possession or control, offered in evidence what was proven to be a copy, except that it does not set out the jurat at length. Objection was sustained, on the grounds that it was secondary, and no foundation laid for its admission. Thereupon plaintiff served notice on defendant's attorneys to produce the original, to which they replied by filing the affidavit of the defendant's secretary, that if they had the original, it was in the office at Des Moines; that they had no such paper at Mt. Pleasant (the place of the trial), and were therefore unable to produce it. The offer was again made, and objection sustained. Afterwards, and during the argument, the court changed its ruling, and permitted the copy to be read in evidence. The giving of notice and proof of loss is made a condition precedent by the contract. Under section 2715 of the code, it is sufficient, in pleading performance of conditions precedent in a contract, to state generally "that he duly performed all the conditions on his part." Section 2717 requires that, in controverting such allegations, "it shall not be sufficient to do so in terms contradictory of the allegation, but the facts relied on shall be specifically stated." The allegation in the petition is: "Plaintiff duly gave said defendant company due notice in writing and proof of said loss, and accompanied said notice by an affidavit stating the facts as to how the loss occurred, so far as the same was within this plaintiff's knowi-

edge, and the extent of the loss." The answer is a denial "that he has made proof of loss, as claimed in his petition, and as required by the contract of insurance as contained in the policy." The only issue joined is, whether notice and proof of loss were given to defendant. There is no statement of facts joining issue as to the form or sufficiency of the proof. It was competent for plaintiff to show by parol evidence that proof of loss was prepared and sent to defendant: *Bish v. Hawkeye Ins. Co.*, 69 Iowa, 186. This the plaintiff did by proofs that are unquestioned. There being no issue as to the form or sufficiency of the notice and proof, there was no necessity for introducing evidence of the contents of either; and hence the admission of the copy could not have prejudiced any rights of the defendant, and is, therefore, not ground for reversal.

5. Plaintiff was permitted to prove, over defendant's objections, that one of his attorneys wrote a letter to the defendant concerning this policy, when it would be paid, and with reference to proof of loss which had been sent. The objection was, that this was giving the contents of the letter without the proper foundation having been laid for secondary evidence. The witness was not asked to, nor did he, state the contents of the letter, but only the subjects about which he wrote. Had his answer shown that it was about subjects foreign to this case, that would have been the end of inquiry; but, being upon subjects pertaining to the case, the inquiry might be pursued further. There is a difference between stating the subject upon which a letter was written and in stating its contents. The witness identified a letter from defendant, through one of its attorneys, as having been received in reply, which letter was offered and objected to. The statement that it was in answer to the former letter was not contradicted, and was corroborated by the subject-matter of the former and the contents of the latter. This letter makes no objection to the form or sufficiency of proof of loss, but states the grounds upon which payment is refused to be the taking out of additional insurance, and other irregularities, in violation of the policy. This letter was introduced before the court had decided to admit the copy of the proof of loss, and for the purpose of showing that the defendant made no objection to the form or sufficiency of the proof. Here, again, the plaintiff was offering evidence not required to sustain his cause of action; but we

fail to discern wherein the admitting of that evidence could have been prejudicial to the defendant.

6. Question is made as to whether the verdict is supported by the evidence, on the grounds that plaintiff's testimony does not show the value of the property destroyed. While it is true that the testimony is not as definite as might be desired, yet it is as much so as the circumstances will admit. Under section 1734 of McClain's code, the amount stated in the policy is *prima facie* evidence of the insurable value of the property at the date of the policy. The testimony is such that we would not be justified in disturbing the verdict on this ground. It was a question for the jury, and we cannot say that there was not evidence to support their finding.

7. In support of the claim of set-off, defendant offered in evidence the premium note set out, to which plaintiff objected, which objection was sustained. The note is an agreement to pay "\$137.40 in such portions and at such times as the directors of said company, agreeably to their act of incorporation and by-laws, require." It was admitted that no assessment had been made. The directors had not declared any portion of said sum as due and payable. Without now determining what the rights of the parties might be after the directors had declared a portion to be paid at the time named, we think it very clear that the defendant was not entitled to recover upon the note until such action had been taken by the directors.

Our conclusion is, upon an examination of the whole case, that the judgment of the district court should be affirmed.

ALTERATION OF INSTRUMENTS — BURDEN OF PROOF. — As to who has the burden of proof in cases where instruments are alleged to have been altered, see *Smith v. Eals*, 81 Iowa, 235; *ante*, p. 486, and note; *Warden etc. Co. v. Willyard*, 46 Minn. 531; 24 Am. St. Rep. 250, and note.

INSURANCE — PRINCIPAL AND AGENT. — An insurance company is bound by the knowledge obtained by its agents: *Western Assurance Co. v. Stoddard*, 88 Ala. 606; *Insurance Co. v. National Bank*, 88 Tenn. 369; *Arff v. Star F. Ins. Co.*, 125 N. Y. 57; 21 Am. St. Rep. 721; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233.

INSURANCE — EVIDENCE OF PROOFS OF LOSS. — As to what evidence is admissible to show that proofs of loss were furnished to the insurance company, see *Pennypacker v. Capital Ins. Co.*, 80 Iowa, 56; 20 Am. St. Rep. 395; *State Ins. Co. v. Schreck*, 27 Neb. 527; 20 Am. St. Rep. 696.

CROW v. BROWN.

[81 IOWA, 344.]

EXECUTION — EXEMPTION. — PROPERTY PURCHASED BY A PENSIONER with moneys received by him as arrears of his pension is exempted from execution, by virtue of the statute of the United States declaring that “no sum of money due or to become due to any pensioner shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the pension-office, or any officer or agent thereof, . . . but shall inure wholly to the benefit of such pensioner.”

Davis and Wells, for the appellant.

Dale and Brown, for the appellees.

ROTHROCK, C. J. 1. In the month of October, 1875, the defendant Brown recovered a judgment against the plaintiff for the sum of four hundred dollars and costs. At that time the plaintiff was insolvent. The plaintiff was a soldier in the war of the rebellion, and in the month of October, 1886, he received a pension from the United States on account of physical disability incurred while in the military service. He was allowed and paid the sum of \$1,440 as arrears of pension. Upon receiving the said sum of money he bought 120 acres of land, for which he paid out of said pension money the sum of five dollars an acre. He built a house on said land into which he moved his wife and family, and has since occupied the premises as a homestead. On the eighteenth day of May, 1889, the defendant Brown caused an execution to be issued on said judgment, and levied on the land, and by this action the plaintiff seeks to restrain the defendant Pomroy, who is sheriff, from selling the land in satisfaction of the judgment.

In the case of *Webb v. Holt*, 57 Iowa, 712, it was held that pension money was exempt from the payment of the debts of the pensioner while it was in course of transmission to him, but not after it came into his possession. This construction of section 4747 of the Revised Statutes of the United States was adopted by a majority of this court. The same principle has since been adhered to in the cases of *Triplett v. Graham*, 58 Iowa, 135; *Baugh v. Barrett*, 69 Iowa, 495; *Farmer v. Turner*, 64 Iowa, 690; and in *Foster v. Byrne*, 76 Iowa, 295. In the first and last of the cited cases, Mr. Justice Beck and the writer hereof dissented from the opinion of the majority. No formal dissent was entered in the other cases. Since the final opinion was filed on rehearing in the case of *Foster v.*

Byrne, 76 Iowa, 295, the *personnel* of this court has been changed, and upon a full examination of the question, a majority of the court are of the opinion that the property purchased with pension money is exempt from execution or attachment under the act of Congress above cited. The reasons for such holding are fully set out in the dissenting opinions above referred to, and need not be repeated here. It is sufficient to say, that if force and effect is to be given to that clause of the act of Congress which provides that pension money "shall inure wholly to the benefit of the pensioner," to the exclusion of his creditors, there appears to us to be no escape from the conclusion that the property purchased with pension money is exempt. Any other construction of the law would permit creditors to subject the money as soon as it reaches the hands of the pensioner.

It is correct, as claimed by counsel for appellees, that the weight of authority is contrary to our present holding. But courts are not always controlled by the weight of authority. If they were, the duties of courts of last resort would be simply to ascertain the number of cases involving the question, and follow the majority. There is the other important consideration, that the weight of authority should commend itself to the judgment and conscience of the court having before it the question for determination.

If the rule adopted by this court heretofore were such as that rights may have accrued by reason of the rule, whereby the law as declared has become what is known in the law as a rule of property, we might well hesitate to overrule the cases above cited. But no such a result will follow our present holding. The relation of the creditor of the veteran pensioned soldier has been in no sense changed by the decisions of this court. The defendant in this action has not extended credit to the plaintiff by reason of the former decisions of this court.

The decree of the district court is reversed.

ROBINSON, J., dissented. He claimed that the words "shall inure wholly to the benefit of such pensioner" were qualified by the preceding clause "whether the same remains with the pension-office, or any officer or agent thereof," and therefore that when the moneys left that office and its agents, and was received by the pensioner and invested by him in other property, there was nothing in the act of Congress, or elsewhere, which exempted such property from execution; and that this view has been the one generally reached by the various courts to which the question has been presented, he established by citing the following: *Rozelle v. Rhodes*, 116 Pa. St. 129; 2 Am.

St. Rep. 591; *Friend v. Garcelon*, 77 Me. 25; 52 Am. Rep. 739; *Crane v. Linneus*, 77 Me. 59; *Cranz v. White*, 27 Kan. 319; 41 Am. Rep. 108; *Jardain v. Fairton Savings Fund Ass'n*, 44 N. J. L. 376; *Robion v. Walker*, 82 Ky. 60; 56 Am. Rep. 878; *Faurote v. Carr*, 108 Ind. 123; *Spelman v. Aldrich*, 126 Mass. 113; *Hissem v. Johnson*, 27 W. Va. 652; and that the only case necessarily in conflict with those authorities was *Folschow v. Werner*, 51 Wis. 85; though a *dictum* to the like effect could be found in *Hayward v. Clark*, 50 Vt. 612.

EXECUTION — EXEMPTION. — The doctrine of the principal case, to the effect that property purchased with pension money is exempt from execution, overruling *Foster v. Byrne*, 76 Iowa, 295, is followed in *Dean v. Clark*, 81 Iowa, 753. In accord with the principal case, also, is *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 550; 16 Am. St. Rep. 855.

PENSIONS — EXEMPTION. — As to when money resulting from pensions becomes subject to garnishment, see *Rozelle v. Rhodes*, 116 Pa. St. 129; 2 Am. St. Rep. 591, and extended note 596-598.

COLES v. KENNEDY.

[81 IOWA, 360.]

CONTRACTS. — PROMISE IS NOT WITHOUT CONSIDERATION when it is to pay \$1,750 for 3,500 shares of the capital stock of a mining corporation, though the only property of the corporation is a mining claim in Arizona, prosecuted to the extent of driving a tunnel for a short distance and sinking a shaft about twenty feet, and in which shaft a small vein of silver ore has been found, but not in quantities sufficient to justify milling the same; nor is the consideration of the promise so inadequate as to constitute a badge of fraud.

CORPORATION — MISREPRESENTATION TO INDUCE PURCHASE OF STOCK. — Agreement to purchase stock in a mining corporation, induced by representing that one who was known as a successful business man of large experience and capacity had subscribed and paid for five thousand shares of such stock, when in fact he had a secret contract exonerating him from making any payment therefor, is obtained by fraud, and will be canceled by a court of equity.

F. M. Stuart, for the appellant.

Mitchell and Penick, for the appellees.

GIVEN, J. The testimony shows that in 1880 appellant was the owner of a mining claim in Arizona, called the "Mina Rica," that had been prospected to the extent of driving a tunnel for a short distance, and sinking a shaft to about twenty feet. A small vein of silver ore was found in the shaft, but not in quantities to justify milling the same. In the spring of 1880, appellant returned from Arizona to Chariton, bringing with him specimens of ore which he represented to have been taken from his claim. He proceeded to organ-

ize a joint-stock company for gold and silver mining in Arizona, "and to purchase the three-fourths interest of the Mina Rica mine." A company was organized with a large capital stock, divided into shares of twenty dollars each. The appellee subscribed for four thousand shares of stock, to be paid for at "fifty cents per share, as per agreement with J. W. Kennedy and R. M. Moore." The contract in question was executed and acknowledged April 1, 1880. By it appellee acknowledged himself to be indebted to the appellant in the sum of \$1,750, to be paid on or before April 1, 1881, and if not-paid at that time, appellee was to make to appellant a warranty deed for a certain lot in Chariton. If one half of said sum was paid within the time named, appellant was to have a deed for the east half of said lot. The only consideration for this contract was three thousand five hundred of the four thousand shares subscribed for by appellee, the other five hundred shares being given to him free of charge. After the organization of the company, appellant gave to appellee and other subscribers orders on the company for their stock. These orders were taken up, and the parties credited with their stock, and statements issued to them showing the amount they were entitled to. As the company desired to raise funds by the sale of stock, it was resolved that none should then be issued to the promoters.

1. But two questions are involved in this case, to wit: Was the agreement without consideration? and was the plaintiff induced to sign the same by fraud? In considering these questions, we are to look at the facts as they were then known to the parties. It is not true, as urged, that all the mining company had was a hole in the ground, twenty feet deep. It had the right to prosecute its business of mining upon that claim to whatever extent it pleased. True, the result was uncertain; but it owned a mining claim that had been prospected to the extent stated, located in a mining region in the vicinity of valuable mines, and had at least an inviting show of valuable ore. The consideration for the agreement in question was a large amount of stock in the company owning this mining claim, with its limited development, and the right to develop it indefinitely. There was certainly not a want of consideration for this contract.

2. We next inquire whether the appellee was induced to execute this contract by reason of fraud, as alleged upon the part of the appellant. It is urged that there is such inade-

quacy of consideration as to indicate fraud. There was great uncertainty as to what appellee might realize out of the consideration moving to him, but it was not so inadequate as to constitute a badge of fraud. The fraud alleged is, that to induce appellee to subscribe for stock in the mining company, and to execute said agreement, appellant exhibited specimens of silver ore containing large and rich proportions of silver, and caused it to be represented to appellee that said ore was taken from the Mina Rica mine; that appellant represented to appellee that one S. H. Mallory had subscribed and paid for five thousand shares in the said mining company; that each of said representations was false and fraudulent; that said mine did not have any silver or gold ore in it, and never had; that the ore exhibited to appellee did not come from and was not taken from said mine; that S. H. Mallory had subscribed for five thousand shares with a secret contract with defendant that they should cost him nothing. All the witnesses testifying upon that subject agreed in stating that there was silver ore in the shaft sunk upon the claim. Appellant testifies that the specimens of ore which he exhibited to appellee were taken from that claim, and this testimony stands uncontradicted by any reliable evidence.

S. H. Mallory had resided in Chariton for many years, and was known in the community as a man of large business experience and capacity, and as a successful business man, whose name as a subscriber would be influential in inducing others to take stock in the mining company. While it is true that Mr. Mallory's name follows that of appellee on the subscription list, it appears that he had agreed to take stock previous to the time the list was circulated for signatures, and that the fact of his agreeing to take five thousand shares of the stock was held out to appellee as an inducement to execute the contract in question. The testimony shows that Mr. Mallory was to have his stock free of charge, and that it was given to him to secure the influence of his name in procuring appellee and others to subscribe. The fact that Mr. Mallory was not to pay for his stock was concealed from the appellee. To have disclosed it would have been to defeat the very purpose for which the five thousand shares were given to Mallory. We have no doubt but the belief that Mr. Mallory had subscribed for five thousand shares of the stock, and that he had or was to pay for the same, operated as an inducement to appellee to subscribe for stock, and execute the contract in

question. This was such a fraud as cannot have the approval of a court of equity, and for which the contract induced by it should be canceled and held for naught.

On the trial, appellee examined several witnesses as to representations made to them as inducements to subscribe for stock, to which defendant objected, because not made to or in the hearing of the plaintiff, and did not operate as an inducement to him to sign the contract in question. This testimony was taken under defendant's objection. It is not now claimed to be admissible, and therefore has not been considered.

The views expressed lead us to the conclusion that the decree of the district court should be affirmed.

PROMISE — CONSIDERATION. — In cases where a contract is founded upon other than a money consideration, and where the promise has been deliberately made, the law looks no further than to see that the contract rests upon a consideration of some value: *Shepherd v. Rhodes*, 7 R. I. 470; 84 Am. Dec. 573, and note. Adequacy of consideration in point of value is not essential to the validity of a promise: *Hind v. Holdship*, 2 Watts, 104; 26 Am. Dec. 107, and note; *Phillips v. Pullen*, 45 N. J. Eq. 5; *Morrill v. Everson*, 77 Cal. 114. Mere inadequacy of consideration will not be inquired into, in the absence of fraud: *Phillips v. Pullen*, 45 N. J. Eq. 830; *Clark's Appeal*, 57 Conn. 565.

CONTRACTS — CANCELLATION BY EQUITY FOR MISREPRESENTATION. — Courts of equity cancel contracts for false representations which constitute an inducement to the contract, and upon which the party had a right to rely, especially where such representations are peculiarly within the knowledge of the party who makes them: *Rorer etc. Co. v. Trout*, 83 Va. 397; 5 Am. St. Rep. 285, and note; *MacLaren v. Cochran*, 44 Minn. 255; *Crooks v. Nippolt*, 44 Minn. 239; *Maxfield v. Schwartz*, 45 Minn. 150.

SWEESY v. SPARLING.

[81 IOWA, 433.]

PUBLIC LANDS. — AGREEMENT TO CONVEY LAND WHEN TITLE THERETO SHALL BE ACQUIRED UNDER THE HOMESTEAD LAWS of the United States is valid and enforceable if, at the time it was made, the parties thereto were in possession of different parts of a tract and each entitled to acquire it under such laws, and the object of the agreement was to avoid difficulty and enable each to acquire title to the portion of which he was already in possession and the right to the possession of which the other conceded.

ACTION to recover possession of real estate. The defendant, by his cross-bill, asserted that the land of which he was in possession was entered at the United States land-office as a

homestead under an agreement between him and the plaintiff, that if the former would not attempt to homestead the land occupied and claimed by him, and would allow the latter to homestead the land possessed by both, plaintiff would convey to defendant the part occupied by him as soon as title was received from the United States. A decree being entered for defendant, plaintiff appealed.

S. H. Cochran and C. E. Underhill, for the appellant.

Pendleton Hubbard, for the appellee.

ROTHROCK, C. J. The land in controversy is situated on the east bank of the Missouri River. It appears from the evidence that the plaintiff homesteaded the whole tract on the fifteenth day of November, 1887. He took possession of the land in September, 1884, and made improvements thereon by building a house, stable, sheds, and cribs, and fencing and clearing up the land. One John Kennedy afterwards made a claim on part of the land, and lived upon it. The plaintiff advised the defendant that Kennedy desired to sell his claim, and at the instance of plaintiff, the defendant bought Kennedy's claim and moved on the land. The plaintiff assisted him in moving. Sparling has been in possession since that time. He built a house, and made other improvements. The evidence is quite clear that the plaintiff recognized the right of the defendant to the part of the land occupied by him to be the same as the right of the plaintiff to that part of which he had possession. The *status* of affairs so remained until the time of the entry. Both of the parties went to the United States land-office at Des Moines to enter their land, when it was discovered that, under the statutes of the United States, all the land had to be homesteaded by one person, or in a different shape from the way in which the parties themselves occupied it. The defendant claims that, to avoid the difficulty, it was agreed that Sweesy should enter the whole tract, and that as soon as he procured the title, he would convey that part now in controversy to the defendant. The plaintiff denies that any such agreement was made. There is a conflict in the evidence on this question. We are satisfied that it is shown by a fair preponderance of the evidence that the agreement was made as claimed by defendant. There is a preponderance so far as the testimony of the witnesses is involved, and defendant and his witnesses are strongly corroborated by the fact that it is undisputed that the plaintiff procured the defend-

ant to purchase whatever right Kennedy had, and recognized the right of defendant to be equal to his own until after it was homesteaded in his name.

The question to be determined is, Can the defendant enforce the agreement made at Des Moines? Or is he precluded from setting it up and claiming under it by the statutes of the United States? It is claimed that the case is within the rule announced by this court in *Oaks v. Heaton*, 44 Iowa, 116, and that the agreement made at the land-office was absolutely null and void. The rule in that case, as stated in the head-note, is as follows: "O. had pre-empted a quarter-section of government land, and had made valuable improvements thereon, when he agreed with H. that if the latter would take possession and perfect a title under the homestead act, he would relinquish his rights already acquired, and should receive, in consideration therefor, a deed to half of the land when the title should be perfected. Held, that the agreement was in violation of the provisions of the homestead act of the United States, and could not be enforced." The case at bar, however, is more nearly like *Snow v. Flannery*, 10 Iowa, 318; 77 Am. Dec. 120. In that case, as in this, the parties settled upon the land before a survey was made by the government, and their respective claims were designated by themselves by claim lines, and both parties had equal claims when they appeared at the land-office to homestead the land, and it was discovered that, under the pre-emption laws, the land could not be entered in parts, but must be entered as a whole; one of the parties must give way, or both abandon their claims. In both cases substantially the same agreement was made, and in the cited case the agreement was enforced. It is claimed, however, that Snow's case arose under the federal statute of 1841, while the entry in the case at bar was made under the homestead act of 1862. We have examined these statutes. The act of 1841 provided that "all assignments and transfers of the rights hereby secured prior to the issuing of the patent shall be null and void." It is true that the act of 1862 is more explicit in requiring the entry to be made for the exclusive use of the person in whose name the entry is made, but both acts provide that transfers or assignments made before the patent issues shall be void. In our opinion, the case at bar is, in substance, the same as the case last above cited. The facts are so nearly alike that the same rules of law should be held to apply. Counsel for appellee

also cite us to the case of *Dawson v. Merrille*, 2 Neb. 119, but that case has been overruled in several subsequent cases: See *Simmons v. Yurann*, 11 Neb. 516; *Bateman v. Robinson*, 12 Neb. 511; *Blanchard v. Jamison*, 14 Neb. 246; and *Carkins v. Anderson*, 21 Neb. 364. The last-named case strongly supports the views we have herein expressed.

We think the decree of the district court is right, and it is affirmed.

PUBLIC LAND — HOMESTEAD — CONVEYANCE OF. — An agreement to convey, by a homesteader, before his entry is complete, is against public policy and void: *Nichols v. Council*, 51 Ark. 26; 14 Am. St. Rep. 20, and note. A homestead settler may make a valid mortgage upon the homestead before he acquires a patent thereto: *Boggan v. Reid*, 1 Wash. 515.

DAVIS v. WESTERN HOME INSURANCE COMPANY.

[81 IOWA, 496.]

INSURANCE — CONDITION AGAINST CHANGE IN EXPOSURE. — If a policy of insurance, issued upon ear-corn in two cribs, contains a condition declaring that it shall be void "if there be any change in the exposure by the erection or occupation of adjacent buildings, or by any means whatever in the control or knowledge of the assured," such condition is violated and the policy avoided if he caused a sheller, operated by steam, and an engine and boiler, furnishing the power, to be brought quite near the cribs, and the corn was destroyed by fire caused by the proximity of the engine to the cribs.

INSURANCE — DEFINITION. — THE WORD "EXPOSURE," as used in policies of insurance, indicates danger of destruction or injury to the property insured from external sources not inherent in the property itself.

Cummins and Wright, and Phelps and Temple, for the appellant.

Willard and Willard, for the appellee.

BECK, J. 1. The policy upon which the action is brought covered ear-corn contained in two cribs. Upon one crib the amount insured was \$1,665, on the other, \$335. The crib first named was burned, and the corn contained in it destroyed. The plaintiff seeks in this action to recover for this loss. The policy contains a condition in the following language: "The policy shall be void and of no effect if, without permission therefor in writing hereon, the assured shall now have, and hereafter make or procure, any other contract of insurance on property covered in whole or in part by this policy, . . . or if there be any change in the exposure, by the

erection or occupation of adjacent buildings, or by any means whatever in the control or knowledge of the assured." The evidence tended to show that the assured brought, or caused, or permitted to be brought and operated, a sheller, propelled by steam, and the engine and boiler furnishing the power, quite near the corn-crib, and that the fire originated from and was caused by the use of such engine in dangerous proximity to the corn-crib. Thereupon the court below gave to the jury the following instruction: "It is provided in the policy 'that this policy shall be void and of no effect if, without permission therefor in writing hereon, there be any change in the exposure, by the erection or occupation of adjacent buildings, or by any means whatever within the control and knowledge of the assured.' Now, the construction of this clause is for the court to determine, and the effect of it is, that the exposure referred to therein, in order to avoid the policy, must be by the erection or occupancy of an adjacent building, or by some means of like character; that is, some permanent erection or structure must have been placed in proximity to the crib which contained the corn, or the occupancy of some building standing at the time the policy was issued, adjacent to the said crib, must have been changed so as to increase the hazard, in order to come within the terms of this provision. And the use of a steam-power to run a sheller in shelling the said corn would not come within the prohibitory clause of the policy referred to in these instructions."

2. In our opinion, the court below erred in this instruction. It is plain that the policy cannot bear the construction therein put upon it. It will be observed that the condition of the policy in question is against "change in exposure." The word "exposure" means "the state of being exposed"; "openness to danger; accessibility to anything that may affect, especially detrimentally." It is a word much used in the business of insurance, in the sense of this definition, to indicate danger of destruction or injury by fire, to property insured, from external sources, and not inherent to the property itself. The word does not in the meaning contemplate any particular source of danger. If danger results to the property from contiguous buildings because of their occupation from pursuits, whether carried on in a building or out of it, from the practice or habit to use fire, from the running of railroad locomotives, and the like, they are said to be exposures to the property. The condition of the policy is against any change

in the exposure by the erection or occupation of adjacent buildings, or by any means whatever in the control of the assured. Exposure from "the erection or occupation of adjacent buildings" is especially prohibited by specific language. All exposures "by any means whatever" are forbidden by general language.

Counsel insist that "it is a general rule in the construction of contracts and statutes, that when general words follow special words, the general words are controlled and governed by the special words." The rule is not accurately stated as it is found in the authority cited by counsel: 2 Parsons on Contracts, 13, note 2. It is there stated in this language: "When, in a statute, general words follow particular ones, the rule is to construe them as applicable to subjects *ejusdem generis*." We may assume, what is probably true, that this rule applies to contracts. The condition of the policy under consideration is against exposures. The erection or occupation of adjacent buildings is specially named as causes producing exposure. In the general language, exposures, "by any other means whatever within the control or knowledge of the assured," are forbidden. The special words forbid "the erection and occupation of adjacent buildings" so as to change or increase the exposure. If they are erected and occupied for the use therein of dangerous elements, as fire, the exposure is increased. Now, it is the use of the element of fire, or other dangerous thing, that is provided against. It is plain that the buildings *per se* are not exposures, and it is equally plain that anything which causes the use of fire or other dangerous elements, by which a building is made an exposure, is *ejusdem generis*. The rule as applicable to this case does not mean that the cause of an exposure, contemplated by the general words of the condition, shall be buildings, or something of the same nature or character, but shall be *ejusdem generis*, of the same nature, kind, or character, in causing exposure to fire. In our opinion, the condition of the contract has not regard to the form, substance, use, or character of the thing creating the exposure. But anything in which fire is used so as to be dangerous, or any occupation when it is so used, or any acts, habits, or customs endangering the insured property which are within the control or knowledge of assured, causes an exposure within the meaning of the conditions of the policy under consideration.

Other questions argued by counsel need not be considered,

as the views we have expressed are decisive of the case upon this appeal. The judgment of the district court is reversed.

INSURANCE — INCREASE OF RISK. — The general rule is, that any increase of risk by the assured, during the period covered by the policy, renders it void, if there is a condition to that effect in the policy: *Moore v. Protection Ins. Co.*, 29 Me. 97; 48 Am. Dec. 514; *Houghton v. Manufacturers' etc. Ins. Co.*, 8 Met. 114; 41 Am. Dec. 489; *Dittmer v. Germania etc. Ins. Co.*, 23 La. Ann. 458; 8 Am. Rep. 600; *Merriam v. Middlesex etc. Ins. Co.*, 21 Pick. 162; 32 Am. Dec. 252, and note.

COOK v. CHICAGO, ROCK ISLAND, AND PACIFIC RAILWAY COMPANY.

[81 IOWA, 551.]

A COMMON CARRIER HAS NO RIGHT TO MAKE UNREASONABLE CHARGES for his services, and cannot lawfully make unjust discrimination between his customers.

COMMON CARRIERS — EVIDENCE OF UNJUST CHARGES. — The fact that certain customers are charged less than others for the same services is evidence that the amount charged the former is unreasonable. Especially is this true when the lesser charges were maintained for long periods of time, and their existence concealed by lying and deceit.

COMMON CARRIER — RECOVERY OF PAYMENTS MADE FOR EXCESSIVE CHARGES. — A shipper is entitled to recover from a common carrier a sum equivalent to the rebate which it allowed other shippers for whom it performed the same kind and extent of services, where it had collected full charges from such shipper without allowing him any rebate, and denied and concealed from him, when making such collection, the fact that it had allowed any rebate to his competitors in business.

PAYMENT, VOLUNTARY, WHAT IS NOT. — Payment by a shipper to a common carrier of a sum in excess of what it was charging his competitors in the same business cannot be regarded as being voluntarily made by him, when he was without knowledge that the exaction was not lawful, and was in belief of the truth of the assertions of the agents of the carrier, that the rate paid by him was the same as that charged to all other shippers.

CARRIERS. — STATUTE OF LIMITATION DOES NOT COMMENCE TO RUN against an action to recover for unjust discrimination made by a common carrier until the fact of such discrimination is discovered, where it is fraudulently concealed by the carrier.

RULE OF COURT requiring copies of all pleadings to be filed for the use of the adverse party, and allowing certain specified sums as costs therefor, is valid.

T. S. Wright, Robert Mather, and Winslow and Varnum, for the appellant.

Alanson Clark, for the appellees.

ROTHROCK, C. J. 1. The action is not founded upon any statute, state or federal. The right to recover is based entirely upon the common law pertaining to the duties and obligations of common carriers. By an amended and substituted petition, the plaintiffs claimed unlawful and unjust overcharges upon the shipment of 316 car-loads. Each shipment was pleaded in a separate count as a separate cause of action. All of the accounts were alike, except in dates of shipment, cars, and kind of stock shipped, and stations from which the shipments were made. It is averred, in substance, in the amended petition, that the public tariff rates for shipment of live-stock, from any point in Jasper County, during the time the plaintiffs made such shipments, was sixty dollars for one car-load; that the plaintiffs paid the full amount of said rates, and that certain other shippers (who are named in the petition) also paid the full tariff rates, but that said other shippers were allowed, and defendant paid to them, a rebate or drawback upon each car-load shipped by them, which rebate or drawback was paid by defendant to said shippers under a private and secret arrangement between the defendant company and said shippers, and that the knowledge of the payment of such rebates was wrongfully and fraudulently concealed from the plaintiffs by the defendant and said other favored shippers; that the agents of the defendant openly announced and declared to the plaintiffs that the public and announced tariff paid by the plaintiffs was correct, and that no cut, rebate, or concession from the same was allowed to any shipper; and that the plaintiffs, by reason of said wrongful and fraudulent agreement, did not and could not have discovered it, and they shipped their stock in the belief that no unjust discrimination was made against them. It is charged that the shipments made by the plaintiffs and those made by the said favored shippers were for precisely the same service, from the same places, upon like conditions, and under precisely the same circumstances, and that the rate charged by the defendant and paid by the plaintiffs was unreasonable, extortionate, and unjust, and that it was an unjust discrimination between shippers for the same service under like circumstances.

Before proceeding to a determination of what we regard as the material question in the case, we will first dispose of a question pertaining to the power of the referee. The petition in the case was twice amended after the cause was referred.

The reference was made by agreement of the parties before any issue was made or tendered in the case. The order of submission was as follows: "By agreement of parties, this cause is referred to D. Ryan, with power to settle issues, and try and hear the cause, and report the facts and conclusions of law." After the reference was made, the parties appeared before the referee, and the issues were made up. The amendments to the petition were very voluminous, and there were certain interrogatories attached to the petition, which interrogatories the plaintiffs demanded should be answered by certain persons claimed to be general officers of the defendant, and a rule was asked that the defendant be required to produce certain books and papers. In other words, the plaintiffs sought, by about all the means known to the law, to compel the defendant to disclose the facts as to the alleged discrimination between shippers. All these movements were resisted by the filing of motions and demurrers, attacking the pleadings, and by refusing to produce its books and papers, and by failing to make full answers to the special interrogatories; and for such failure, the referee ordered that the petition be taken as true, except so far as its averments were modified by the evidence introduced on the trial. It is claimed in behalf of the defendant that, under our practice, a referee has no power to make the orders which the referee made with reference to the failure to produce books and papers, and the failure to answer the special interrogatories. We do not think it is proper to determine what power a referee may have in these respects, for the reason that there is really not a disputed question of fact in the case. The evidence of the witnesses introduced by the plaintiffs establishes the facts pleaded in the petition without conflict. The defendant did not introduce any evidence; and if the facts pleaded entitle the plaintiffs to recover, it would have been clearly against the undisputed evidence to have made a finding for the defendant. We will now state, as briefly as may be, the substance of the evidence.

It appears that one E. R. Clapp was an employee of the defendant. He was located at Des Moines, and was known among shippers of live-stock as the Iowa stock agent of the defendant. Clapp was frequently along the railroad in conference with shippers of live-stock. He held this position during the time that the plaintiffs made the shipments set forth in their petition. There were a number of shippers of

live-stock in and about Newton, the principal station on the defendant's road in Jasper County. During nearly the whole time covered by this action, the tariff rate for shipment of live-stock from Newton to Chicago was sixty dollars per car-load. It was practically the same from the stations next east and west of Newton. There was at times a slight difference, but not enough to be a material fact in the case. The freight charges, as given by the defendant to its station agents, were, for the most of the time, sixty dollars per car-load, and this rate was given out by station agents to shippers as the charge made by the defendant. All of the car-loads sent forward by all the shippers were billed by the agents at the full rate given out by the company. The stock was shipped in the usual manner. No part of the freight charges were in any case paid at the place of shipment. The cars were billed to commission houses at the Union stock-yards. The stock was sold by the commission men, and after taking out their commissions and paying the freight, the balance of the proceeds of the sales was remitted to the shipper. This was the uniform manner of transacting the business. All of the shippers were dealt with in exactly the same manner until the stock was sold, and the regular freight charges paid. There was no difference in the manner of the service. All of the shippers were given the same kind of cars, and the stock shipped by the plaintiffs was conveyed in the same kind of trains, and on the same time, and with the same privileges as to the free transportation of one or more men to take care of the stock while in transit. In short, the plaintiffs had no preference over other shippers in any respect. It appears without conflict that at least three other firms or individuals engaged in the same business at the same place, and in competition with the plaintiffs, had private and secret agreements with Clapp, the said stock agent, by which they were paid a rebate of from three to twenty dollars on each car-load shipped. These agreements were not uniform at all times. The amount to be paid varied just as the parties were able to agree upon the terms. So far as appears, Clapp always performed the contracts. He paid the rebates sometimes in currency, at other times by sending the money to the shippers by express. There were short intervals during the time that no rebates were paid. But these intervals were the exception, and not the rule. And Clapp always exacted a promise from the favored shippers that the fact of the payment of rebates must

be kept secret. We have not made a careful estimate of the number of car-loads shipped by the favored shippers. Indeed, no exact estimate could be made from the evidence. It is shown, however, beyond all question, that not less than eighteen hundred car-loads, in the aggregate, were shipped by the favored shippers. The plaintiffs made application to Clapp for better terms, and were refused. He invariably stated in most positive terms that no rebates nor concessions were allowed to any of the plaintiffs' competitors. The referee found that the plaintiffs were entitled to recover on part of the shipments at the rate of three dollars per car, and on others at five dollars, and on the remainder at the rate of ten dollars per car. The aggregate amount found to be due, including interest, was \$2,733.98. If the plaintiffs are entitled to recover on the ground of unjust discrimination, the evidence shows beyond all controversy that the judgment is not excessive. Indeed, we do not understand appellant's counsel to claim that the judgment is excessive.

The real question in the case is, Do the facts above recited authorize a recovery on the part of the plaintiffs? It is well to keep in mind the fact that the defendant is a public common carrier. At common law a public or common carrier is bound to accept and carry for all upon being paid a reasonable compensation. The fact that the charge is less for one than another is only evidence to show that a particular charge is unreasonable. In Story on Bailments, sec. 508, note 3, it is said: "There is nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even *gratis*." And in 1 Wood on Railroads, 566, it is said: "A mere discrimination in favor of a customer is not unlawful, unless it is an unjust discrimination." In 2 Redfield on Railways, 95, the following language is used: "It has been held in this country, where there is no statutory regulation affecting the question, that common carriers are not absolutely bound to charge all customers the same price for the same service. But as the rule is clearly established at common law that a carrier is bound by law to carry everything which is brought to him, for a reasonable sum to be paid to him for the same carriage, and not to extort what he will, it would seem to follow that he is bound to carry for all at the same price, unless there is some special reason for the distinction. For unless this were so, the duty to carry for all would not be of much value to the public, since it would be

easy for the carrier to select his own customers at will, by the arbitrary discrimination in his prices. Hence it was held, at an early day, that all that could be required on the part of the owner of the goods by way of compensation was, that he should be ready and willing to pay a reasonable compensation, and to deposit the money in advance, if required. Carrying for reasonable compensation must imply that the same compensation is accepted always for the same service, else it could not be reasonable, either absolutely or relatively." In *Hutchinson on Carriers*, 243, after a review of the cases, it is said: "Hence we may conclude that in this country, independently of statutory provisions, all common carriers will be held to the strictest impartiality in the conduct of their business, and that all privileges or preferences given to one customer, which are not extended to all, are in violation of public duty." An examination of the authorities cited by these learned authors leaves no doubt that a common carrier has no right to make unreasonable charges for his services, and that he cannot lawfully make unjust discrimination between his customers. It is strenuously contended by counsel for appellant that it is not charged in the petition as a substantial fact that the rate charged the plaintiffs was unreasonable. It is distinctly averred that the rate charged the plaintiffs "was unreasonable, and is and was an unjust discrimination." This appears to us to be a sufficient answer to the argument of counsel to the effect that the action is founded solely upon the fact of mere difference in rates. It appears to be conceded that the defendant had no right to exact unreasonable rates, or to make unjust discriminations between shippers which, in effect, compels one shipper to pay an unreasonable rate.

The above principles of law may be said to be fundamental, and it is only necessary to apply the facts to reach the conclusion that the rates paid by the plaintiffs were unreasonable and unjust discrimination. It is not claimed that the favored shippers were objects of the charity of the defendant. The payment of the rebates cannot be designated as "alms-giving." It does not appear that the concessions were made because the favored shippers furnished more shipments than the plaintiffs. The fact is, that some of the others shipped less than the plaintiffs. In short, there is no reason for the discrimination. It is true that it is claimed that the rebate shippers bought cattle and hogs from territory in which ship-

ments would ordinarily be made upon other railroads, but the evidence shows that the plaintiffs' field of operation was about the same as the other shippers. It does not appear that the rebates were allowed merely at times when there were cut rates or a war of rates between the defendant and rival railroad lines. The rebates were paid regularly for years, with but short intervals. Is it to be supposed that any court or jury under this state of facts would solemnly find, declare, and adjudge that, after paying the rebate, the defendant did not have a reasonable compensation for the service? The only finding that can in any fairness be made is, that after deducting the rebate the rate was reasonable, and that the exaction from the plaintiffs was unreasonable, and the discrimination against them unjust. And the fact that it was secretly done, and that it appeared to be necessary to carry it on by lying and deceit, surely does not tend to commend such a course of dealing to fair-minded men. We have been cited to a number of adjudged cases by counsel for the respective parties, and we think we may safely say that not one of them is in conflict with the views we have herein expressed upon this question. On the contrary, and in support of our conclusion, see *Sharpless v. Mayor*, 21 Pa. St. 147; 59 Am. Dec. 759; *New England Exp. Co. v. Maine etc. R'y Co.*, 57 Me. 188; 2 Am. Rep. 31; *McDuffee v. Portland etc. R'y Co.*, 52 N. H. 430; 13 Am. Rep. 72; *Messenger v. Pennsylvania R'y Co.*, 36 N. J. L. 407; 13 Am. Rep. 457.

2. It is claimed in behalf of appellant that the payments by the plaintiffs were voluntarily made, and cannot be recovered back. It is true, the money was paid without duress of person or goods, but it was paid, not only without knowledge that it was a wrongful exaction, but in the belief of the truth of the positive assertions of Clapp, that no shipper was allowed any rebate. That such a payment is not voluntary, see 1 *Parsons on Contracts*, 466, and *Heiserman v. Burlington etc. R'y Co.*, 63 Iowa, 732.

3. The defendant pleaded the statute of limitations as to part of the claim. The same question was considered in the case of *Carrier v. Chicago etc. R'y Co.*, 79 Iowa, 80, where it was held that the statute of limitations was no bar to the action. Following that case, we hold that the statute did not commence to run while the plaintiffs had no knowledge of their rights in the premises, owing to the fraudulent concealment of the cause of action by the defendant.

4. The defendant also appeals from an order overruling a motion to retax costs in the case. It appears that the sum of \$582 was taxed as costs for copies of the petition and the several amendments thereto. It is shown by evidence taken on the hearing of the motion that the petitions and copies thereof were printed at an expense of not to exceed thirty dollars. The action of the court in taxing this erroneous item of costs was founded upon rule 1 of the rules of practice adopted by the convention of district judges, which went into effect July 4, 1887. The following is a copy of the rule: "Every party, at the time of filing any petition, answer, reply, demurrer, or motion, . . . shall file with the same one plain copy thereof for the use of the adverse party; and on failure to do so, the same may be continued, at the option of the adverse party, or the paper so filed stricken from the files. A fee of ten cents per hundred words shall be allowed for all copies, and taxed with the costs." Substantially the same rule was in force in some of the districts of this state for many years before it was adopted by the convention of judges. We are of opinion that such a rule of practice is valid, and that it was within the power of the judges to authorize costs to be taxed therefor, but it surely was not intended that the rule should be made an instrument of oppression. There is no requirement that a literal copy of all the pleadings should be made, when such pleadings are precisely alike, excepting, possibly, a date, an amount, or the like. The purposes of the rule would have been fully subserved by a copy of one count, with a mere reference to the others. The court ought to have the discretion to prevent speculative and unnecessary costs. This item of costs will be reduced to fifteen dollars. The rule surely ought not to apply literally to petitions like this.

5. The plaintiffs also appealed from the judgment; but if the judgment be affirmed on the defendant's appeal, they consent that it may be affirmed on their appeal. The judgment will therefore be affirmed throughout, with the exception as to the item of costs, as above mentioned. And as the defendant was successful on that branch of the appeal, twenty-five dollars of the costs in this court will be taxed to the plaintiffs; and the plaintiffs will also be taxed twenty-five dollars by reason of the affirmance of their appeal. These assessments appear to us, from an examination of the abstracts and arguments, to be about correct.

Modified and affirmed.

CARRIERS — RIGHT TO DISCRIMINATE. — A carrier cannot unreasonably or unjustly discriminate between its customers in its charges for carrying freight: *Root v. Long Island R. R. Co.*, 114 N. Y. 300; 11 Am. St. Rep. 643, and extended note. See *Cleveland etc. R'y Co. v. Closser*, 126 Ind. 348; 23 Am. St. Rep. 593, and note.

A common carrier is bound to carry for a reasonable remuneration: *Johnson v. Pensacola etc. R. R. Co.*, 16 Fla. 623; 28 Am. Rep. 731.

CARRIERS — LIABILITY FOR OVERCHARGE. — An action lies after payment to recover back an overcharge by a carrier: *Mt. Pleasant etc. Co. v. Cape Fear R. R. Co.*, 106 N. C. 207; *Little Rock etc. R'y Co. v. Daniels*, 49 Ark. 352.

PAYMENTS, WHEN VOLUNTARY: See *Orleans etc. Bank v. Moore*, 112 N. Y. 543; 8 Am. St. Rep. 775, and note; *Vick v. Shinn*, 49 Ark. 70; 4 Am. St. Rep. 26, and note. A payment under protest is not voluntary, and may be recovered: *State v. Nelson*, 41 Minn. 25. An overpayment voluntarily made, if not induced by fraud, can only be recovered where there has been previous notice and demand: *Gillett v. Brewster*, 62 Vt. 312. In order to maintain an action to recover back money paid in satisfaction of an illegal assessment, it must appear that the payment was made through ignorance: *Redmond v. Mayor*, 152 N. Y. 632; *contra*, *Jefferson Co. v. Hawkins*, 23 Fla. 223.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

MEFFORD v. DOUGHERTY.

[89 KENTUCKY, 58.]

WILLS — CONSTRUCTION OF DEVISE. — THE WORD “CHILDREN” imports only immediate descendants, and when used in a deed or will, the children take as purchasers, and are vested, if living, when the devise is to one and his children, with a present interest, or take under the devise as they come into being.

WILLS — LIFE ESTATE, WHEN CREATED BY. — DEVISE TO G. AND TO HIS CHILDREN, the heirs of his body, does not vest in G. anything beyond a life estate, though the testator, in another clause, speaks “of the land I have devised to G.”

Victor F. Bradley, for the appellant.

Owens and Finnell, for the appellee.

PRYOR, J. This is an action to enforce a contract of purchase made between George Dougherty and the appellant. The defense is a want of title. At first impression, it would seem that the testator, in the devise made to his two children, intended to invest them with the fee in the land; but a more careful consideration of the testamentary paper would necessitate the violation not only of well-recognized rules of construction, but require the court to pervert the meaning of the word “children,” in order to reach such a conclusion. The testator owned a small tract of land, containing about one hundred and fifty acres, and died, leaving surviving him two children, — a son and daughter. The language of the will is: “I give to my son George, and to his children, the heirs of his body, about fifty acres of land. . . . The land I have given my son George to be bounded,” etc. The same provis-

ion is made in the devise to his daughter, except that the devise to her is burdened with the payment of an eight-hundred-dollar debt. She gets one hundred acres. A devise to the son and his bodily heirs, or to the son and his issue forever would vest no title in the children, but the language used would be construed as passing from the devisor to the devisee such an estate as would descend from the devisee to those who were entitled to inherit from him. The words enlarge, instead of restricting, the interest devised, and, by our statute, pass to the devisee the whole of the estate devised, — that is, a fee-simple title. The bodily heirs or issue do not take as purchasers, unless, by the will or deed, a life estate is carved out of the fee by the testator. A devise to A for life, and after his death to his heirs, or the heirs of his body, nothing else appearing, vests the heir as a purchaser with the remainder interest: See Gen. Stats., c. 63, art. 1, sec. 10.

Where the devise is to A and his children, the children take as purchasers, and the question generally is, whether A is vested with a life estate, or only holds a joint interest with his children. The word "heirs," or "heirs lawfully begotten," embrace all the descendants of the devisee or grantee; but the word "children" embraces only immediate descendants, and when used in a deed or will, the children take as purchasers, and are vested, if living, when the devise is to one and his children, with a present interest, or take under the devise as they come into being. It is argued, with much plausibility, that the words "heirs of his body," immediately following the word "children," explain the meaning of the testator to be a devise to his son George and his bodily heirs. The devise is to his son, George Dougherty, and to his children, the heirs of his body; and to arrive at such a conclusion, you must erase from the devise the words "and to his children," leaving the devise to George and his bodily heirs, or the heirs of his body, which, if done, might defeat the intent of the testator.

He devises one hundred acres of the land to his daughter in the same way, to her and to her children, the heirs of her body, and burdens the devise with the payment of a debt of eight hundred dollars. Now, this burden rests on the entire devise, and not alone on the interest the daughter is to take; and if the devise to George, which is now in controversy, was erased from the will of the testator altogether, and only the one devise appeared, and that to the daughter, it would be

held at once that the purpose of the testator was to secure the land to the daughter and her children, and that she had but a life estate.

So the devise to the son, by which his estate is limited, should not be enlarged upon the mere probability that the testator intended to give him the fee. It is true, the testator, in speaking of the devises of his children, says, when alluding to the boundary, "the land I have devised to George"; "the land I have devised to my daughter"; but such expressions are not inconsistent with the devise as it reads, and some meaning must be attached to the word "children."

The will was evidently written by one of more than ordinary intelligence, embracing in a few words the devise of the whole estate, and the draughtsman, as well as the testator, must have had some reason for inserting the word "children," and to divest them of all interest would tend to defeat the intention of the testator.

The judgment is therefore reversed with directions to dismiss the petition, or cancel the contract if the appellant desires it.

DEVISE — WORDS CREATING LIFE ESTATE. — A devise to a son for his support, the property to go to the use of his children if he have any, creates only a life estate in the devisee. The word "children," as used, is clearly a word of purchase, and not of limitation: *Oyster v. Knull*, 137 Pa. St. 448; 21 Am. St. Rep. 890, and note. See extended note to *Carpenter v. Van Olinder*, 11 Am. St. Rep. 99-107. A devise to the testator's son, and after his death to his children, gives a life estate to the son: *Goodrich v. Pearce*, 83 Ga. 781; *Shadden v. Hembree*, 17 Or. 14. See also *Owens v. Dunn*, 85 Tenn. 131; *Mercantile etc. Co. v. Brown*, 71 Md. 166.

DEVISE — CHILDREN — WHO INCLUDED. — A devise to one for life, and then to his children, means his immediate descendants, and includes all of his children up to the time of his decease, whether born after decease of testator or not: *Thompson v. Garwood*, 3 Whart. 287; 31 Am. Dec. 502. See *Lombard v. Willis*, 147 Mass. 13.

YARBROUGH v. COMMONWEALTH.

[89 KENTUCKY, 151.]

BAIL FOR THE APPEARANCE OF AN ACCUSED cannot avoid their liability for his non-appearance by showing that it was caused by his being in custody in another state, under a conviction there had against him for the commission of a felony.

FORMER JEOPARDY — DISAGREEMENT OF JURY. — The fact that one accused of a crime is tried before a jury which, in announcing that its members cannot agree, is discharged in his absence, and while he is confined in jail, does not entitle him to be released from custody and further trial on the ground that he has been once in jeopardy.

COURT, DISCRETION OF. — If a statute provides that "if, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in the bail bond," the discretion of the court in exacting two thirds of the amount of the bail will not be controlled by the appellate court, in the absence of evidence that it was flagrantly abused.

Weir, Weir, and Walker, R. W. Slack, and R. S. Todd, for the appellants.

P. W. Hardin, attorney-general, for the appellee.

HOLT, J. Thomas Lockard was put upon trial for house-breaking. The case was fully heard. The jury, after considering it for some time, came into court, and, in the enforced absence of the accused in jail upon the charge, reported that they could not agree; thereupon they were discharged.

Thereafter the appellants became his bail, and upon being released, he went to Indiana, where he committed an offense, for which he was sent to the penitentiary of that state, and was there confined when the bail bond executed by the appellants was forfeited on account of his non-appearance. They resisted a judgment against them for the amount of the bond upon two grounds: 1. That Lockard, without their knowledge, had gone to Indiana, and was there confined in the penitentiary, under a judgment for crime, when the bond was forfeited, and could not therefore appear here in court, or be produced for trial in this state in discharge of it; 2. That by the mistrial above mentioned, Lockard had been put in jeopardy; that the discharge of the jury without his consent, and while he was absent in jail upon the charge, was equivalent in law to an acquittal; and that the appellants were not, therefore, liable upon the bond, because, if he had appeared when it was forfeited, there was no prosecution pending against him upon which he could have been tried and convicted.

The appellants rely upon the case of *Commonwealth v. Overby*, 80 Ky. 208, 44 Am. Rep. 471, to support the first point. That case, however, is not analogous to this one. There Overby executed a bond for the appearance of the accused in the state court to answer a charge of passing counterfeit United States treasury notes. The next day he was arrested by the United States authorities for the same offense, and was thereafter tried in the United States court for Kentucky, and sentenced to the penitentiary. This court held that this exonerated the bail in the state court. The offense was the same. The United States court had jurisdiction. The accused had not voluntarily left the state, and been convicted of a different crime in another jurisdiction, as is the case here.

The object in requiring bail is to insure the attendance of the accused to answer the charge, and the orders and judgment of the court in reference to it; and our statute provides that the bail may, at any time before the forfeiture, exonerate themselves by surrendering him to the jailer of the county where the prosecution is pending; and one of the modes provided for doing so is through the aid of the peace-officers of the state. There is therefore an implied obligation upon the part of the commonwealth that the bail shall not be hindered in doing so by any authority within the limits of the state. This is the ground upon which the rule in the Overby case rests; and is entirely unlike a case where the bail, who have the friendly custody of the accused, and may prevent his departure from the state by a surrender of him at any time, permit him to leave the commonwealth, and he is then arrested elsewhere for other crime: *Withrow v. Commonwealth*, 1 Bush, 17.

It is unnecessary to determine whether the bail can, where the prosecution has, in effect, been wiped out by the former jeopardy of the accused, avail themselves of it as a defense to the forfeiture of their undertaking that he shall, at all times, answer to the charge and the orders of the court. The state of case presented does not raise the question.

One trial, and only one, is an elementary principle in criminal law. Any other rule would be tyranny in a free country. It therefore has constitutional sanction. Exceptions exist, from necessity, to the rule; but they should be few, and strictly guarded. They arise most frequently in cases where trials are begun, but not ended. Undoubtedly jeopardy may attach without waiting for a verdict. In a combat intended

to be deadly, it cannot well be said one is not in danger until he is hit. If, however, a necessity exists for the discharge of the jury before the finding of a verdict, then the proper administration of justice requires that this should constitute an exception to the general rule.

To allow one charged with crime, however heinous, to go free because the jury had to be discharged by reason of the illness of a member of it, or the sudden sickness of the judge, would be a defeat of the end sought at the expense of reason. This necessity may arise in various forms. One is a mistrial from a failure of the jury to agree.

An arbitrary discharge of the jury without any cause would be a bar. In this case, however, the jury, after considering the case for some time, reported that they could not agree, and were then discharged. It is true, this was done in the absence of the accused, and while he was in jail. Properly, he should have been in court. He had a right to be there. Our constitution, in substance, so provides, as well as section 183 of our Criminal Code. If he had been there, however, he could not have prevented the discharge of the jury. Under the circumstances, it was a matter altogether within the discretion of the trial judge. An exception by the accused, if he had been present, would have been unavailing; and this court, were he now here making the question, would answer it by saying that it was a matter discretionary with the lower court, and we will not, therefore, interfere.

In addition to this, it substantially appears affirmatively that the accused was not prejudiced by the court's action. The jury considered the case for some time. They then reported their disagreement to the court. He inquired of them as to the probability of their reaching an agreement, and was informed that there was none. They were then discharged.

We fail to see why the accused is to be regarded as having been in jeopardy, and the mistrial as an end virtually of the prosecution, or as equivalent to an acquittal, because he was not present when the jury were discharged, any more than it would have been if he had been present. It was still merely a mistrial by the failure of the jury to agree; moreover, he was not prejudiced by the disregard of his constitutional right to be present at every stage of his trial, and in such case this court will not reverse the judgment: *Meece v. Commonwealth*, 78 Ky. 586.

It follows if the action complained of would not have been available to Lockard, neither is it to the appellants.

After the forfeiture of the bond, but before the rendition of the judgment against them, they surrendered Lockard to the lower court, he having been discharged from the Indiana penitentiary. In consideration of this, the court rendered judgment against them for but two thirds of the bond. It is now urged that it should have remitted it entirely, and that it was an abuse of discretion not to do so. Section 98 of the Criminal Code provides: "If, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in the bail bond."

The discretion named is, of course, a judicial^o and not an arbitrary one; but its exercise will not be controlled by this court, unless flagrantly abused, and that has not been done in this instance.

Judgment affirmed.

BAIL — PRINCIPAL IMPRISONED IN ANOTHER STATE OR COUNTY — EFFECT OF, ON SURETY. — A surety in a recognizance is not released by the inability of the principal to fulfill the condition by reason of his conviction and imprisonment in another state: *State v. Horn*, 70 Mo. 466; 35 Am. Rep. 437; *State v. Merrihew*, 47 Iowa, 112; 29 Am. Rep. 464; *Taintor v. Taylor*, 36 Conn. 242; 4 Am. Rep. 58; *Tedford v. State*, 67 Miss. 363. The contrary doctrine is maintained by the following cases: *Commonwealth v. Overby*, 80 Ky. 208; 44 Am. Rep. 471; *Cooper v. State*, 5 Tex. App. 215; 32 Am. Rep. 571; *Steelman v. Mattix*, 38 N. J. L. 247; 20 Am. Rep. 389; *Belding v. State*, 25 Ark. 315; 4 Am. Rep. 26; *Belding v. State*, 25 Ark. 315; 99 Am. Dec. 214, and extended note.

FORMER JEOPARDY — DISAGREEMENT OF JURY. — It is provided by the constitution of Colorado that "if the jury disagree, the accused shall not be deemed to have been in jeopardy": *In re Allison*, 13 Col. 525; 16 Am. St. Rep. 224, and note. A defendant is not entitled to discharge on a plea of former jeopardy, where the jury was discharged for inability to agree upon a verdict: *Ex parte McLaughlin*, 41 Cal. 211; 10 Am. Rep. 272; *State v. Tilletson*, 7 Jones, 114; 75 Am. Dec. 456; *Price v. State*, 36 Miss. 531; 72 Am. Dec. 195, and note; *Helm v. State*, 66 Miss. 537; *State v. Leach*, 120 Ind. 124; *contra*, see *State v. McGimsey*, 80 N. C. 377; 30 Am. Rep. 90; *State v. Wilson*, 50 Ind. 487; 19 Am. Rep. 719; *Foster v. State*, 88 Ala. 182. The plea of former jeopardy having been set up in a subsequent trial, whether the jury in the former trial was allowed reasonable time within which to reach a verdict is a question of law for the court, and not one of fact for the jury: *Helms v. State*, 67 Miss. 562.

COMMONWEALTH v. WILSON.

[89 KENTUCKY, 157.]

FORGERY — DEFINITION OF. — The false making or materially altering, with the intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy or the foundation of legal liability, is forgery.

FORGERY NEED NOT BE THE DOING OF AN ACT IN THE NAME OF ANOTHER. — The offender may be guilty of the false making of an instrument, although he signed his own name, if it is false in a material part, and calculated to induce another to give credit to it as genuine and authentic when it is false and deceptive.

FORGERY. — A SURVEYOR WHO EXECUTED, WITH INTENT TO DEFRAUD, A WRITING FALSELY CERTIFYING THAT A SURVEY had been made by him, and giving the boundaries and the names of the chain-carriers, when in fact he did not make any survey whatever, is guilty of forgery, though he signed his own name thereto, if the certificate is one provided for by law, and would have possessed legal efficacy if genuine and authentic.

P. W. Hardin, attorney-general, for the appellant.

LEWIS, C. J. The offense charged in the indictment against the accused is forgery, alleged to have been committed as follows:—

“The said Z. B. Wilson did, on the thirtieth day of September, 1886, in the county of Harlan and state of Kentucky, unlawfully and willfully and feloniously, and with the fraudulent intent and for the purpose of defrauding the commonwealth of Kentucky and Harlan County out of the vacant and unappropriated lands belonging to said county, did make, forge, utter, and put a survey, plat, and certificate in the name of B. F. Engle, which survey, plat, and certificate is in the following words and figures, viz.:—

“‘State of Kentucky, Harlan County, Sct., March 9, 1882.

“‘Surveyed for B. F. Engle two hundred acres of land, by virtue of an order from the Harlan County court for two hundred, situated in Harlan County, and bounded as follows [giving the boundary].

“‘Z. B. WILSON, S. H. C.

“‘J. H. CALDISON.

“‘S. McKNIGHT, C. M.

“‘Z. B. WILSON, Marker.’”

It is further alleged that said Caldison and McKnight were not chain-men in making said pretended survey, which was not in fact made at all, nor was a copy of any such survey recorded upon the surveyor's book by said Wilson, who was surveyor of said county, or any one else; but said plat, certifi-

cate, and survey, together with the names of said Caldison and McKnight, were, for the purpose aforesaid, forged.

As a demurrer was sustained to the indictment, the only question before us is, whether the facts stated constitute a public offense. By section 1, chapter 109, General Statutes, it is provided that any person who wishes to appropriate any vacant and unappropriated lands may, on application to the county court of the county in which the same lies, and paying therefor such price as the court may allow, not less than five dollars per hundred acres, obtain an order of court authorizing him to enter and survey any number of acres of such land in the county, not more than two hundred, and the party obtaining such order may, by an entry in the surveyor's book of the county describing the same, appropriate the quantity of land it calls for in one or more parcels, as he may think proper, but no person shall enter, survey, or cause to be patented more than two hundred acres of land in any one county.

By section 3, it is made the duty of the surveyor to survey the entries in the succession in point of time in which they are made, in the presence of two disinterested housekeepers as chain-men, whose names must be placed at the bottom of the plat and certificate.

Such survey must be made within six months after the date of the entry, and a plat and certificate of the survey must be made out by the surveyor, and recorded in his books, and the original thereof, and a copy of the order of court under which it is made, must be deposited in the register's office within six months after the survey is made, and a patent may issue on the survey within three months after the survey is made, but the legal title shall bear date from time of making the survey. It is, however, further provided that the register may receive plats and certificates of survey after the time mentioned for returning the same; but in such case the legal title shall take effect only from date of the patent.

Forgery, as described in 4 Blackstone's Commentaries, 247, is "the fraudulent making or alteration of a writing to the prejudice of another man's rights." Extending the definition, it may with accuracy be "the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability": 1 Bishop's Crim. Law, sec. 572.

It will be perceived that the charge in the indictment is,

that, September 30, 1886, the accused forged, uttered, and put a survey, plat, and certificate, purporting to have been made May 9, 1882, by him as surveyor of Harlan County, for one B. F. Engle, which in fact was never made, and that the two persons, Caldison and McKnight, whose names were placed by him at the bottom of the pretended plat and certificate as chain-men, did not act as such.

The pretended plat and certificate, in the form it is set out in the indictment, was of apparent legal efficacy, and sufficient, under the statute, to authorize and require the register of the land-office to issue a patent to Engle, thereby divesting the commonwealth of the legal title, Harlan County of the beneficial interest, in the land, and preventing the appropriation of it by any other person; and though it is not in express terms charged a patent was actually issued to Engle, it is charged the plat and certificate were forged, uttered, and put with intent to defraud, which, adopting the definition referred to, is sufficient to describe, and if proved fix, the crime of forgery on the accused.

But forgery, according to Lord Coke, "is properly taken when the act is done in the name of another person." He, however, further says that "an offender may be guilty of a false making of an instrument, although he sign and execute it in his own name, in case it be false in any material part, and calculated to induce another to give credit to it as genuine and authentic when it is false and deceptive"; and an example is given in the books where one, having conveyed the title to land, afterwards, for the purpose of fraud, executes an instrument purporting to be a prior conveyance of the same land; for such instrument is designed to obtain credit by deception, as purporting to have been made at a time earlier than the true time of its execution: 1 Hale P. C. 683; 1 Hawk. P. C. 263.

In 2 Bishop's Criminal Law, sec. 585, it is said that, "plainly, the broad doctrine is not maintainable that it is incompetent for a man to commit forgery of an instrument executed by himself." And if it be forgery in the case referred to, where the deed was executed by the accused person, it clearly must be so regarded in this case. For not only was the plat and certificate as charged fraudulent, but though made by the accused person, purported to be not his individual but official act as surveyor, wherein the writing was false and deceptive, and whereby only would it have possessed legal efficacy if

genuine and authentic. It seems to us, therefore, adopting and applying a reasonable and practical definition of the crime, the facts stated in the indictment constitute the offense of forgery. For the writing, as charged, was made with intent to defraud; was calculated to induce another to give credit to it as genuine, and if it had been so, would have entitled Engle to a patent, and was made in the name of the accused, in his official capacity, which was to a reasonable intent, and of the same effect, as if he had made it in the name of another surveyor.

The judgment is reversed, with directions to overrule the demurrer to the indictment.

CRIMINAL LAW — FORGERY — WHAT CONSTITUTES. — To falsely make or alter a promissory note, with the intent to defraud another, is forgery: *State v. Wheeler*, 20 Or. 192; 23 Am. St. Rep. 119, and note. As to what is forgery, see *Shawhan v. Long*, 26 Iowa, 488; 96 Am. Dec. 164, and note; *State v. Curtis*, 39 Minn. 357; *Cox v. State*, 66 Miss. 14.

CRIMINAL LAW — FORGERY. — Forgery may be committed by fraudulently making over one's own signature a writing which, if genuine, would possess legal efficacy, and which, though fraudulent, may operate to another's prejudice: *Luttrell v. State*, 85 Tenn. 232; 4 Am. St. Rep. 760, and note; *Hale v. State*, 1 Cold. 167; 78 Am. Dec. 438, and note; *State v. Hall*, 108 N. C. 777; *Cox v. State*, 66 Miss. 14. See extended note to *Arnold v. Cost*, 22 Am. Dec. 306-321.

TALBOTT v. STEMMONS.

[89 KENTUCKY, 222.]

CONTRACT — CONSIDERATION — SUFFICIENCY OF. — A promise, if the promisee will not chew nor smoke tobacco during the life of the promisor, to pay him a certain sum at the death of the latter, is based upon a sufficient consideration, and may be enforced against his estate.

J. H. Brent, for the appellant.

Lockhart and Lyng, for the appellee.

PRYOR, J. This case comes from the superior court by an appeal.

Mrs. Sallie D. Stemmons, the step-grandmother of the plaintiff, Albert R. Talbott, made with the latter the following agreement: —

“ April 26, 1880.

“ I do promise and bind myself to give my grandson, Albert R. Talbott, five hundred dollars at my death if he will never take another chew of tobacco or smoke another cigar during

my life, from this date up to my death; and if he breaks this pledge, he is to refund double the amount to his mother.

[Signed]

"ALBERT R. TALBOTT.

"SALLIE D. STEMMONS."

The grandmother died, and this action was instituted by the grandson against her personal representative to recover the five hundred dollars, the plaintiff alleging that, from the date of the agreement to the filing of this action by him, he had not smoked a cigar or taken a chew of tobacco, etc.

A general demurrer was filed to the petition, that was sustained by the court below, and the action dismissed. It is insisted by counsel for the personal representative that the agreement by the grandmother to pay the five hundred dollars is not based on a sufficient consideration, either good or valuable, and being a mere gratuitous undertaking, cannot be enforced.

There is nothing in such an agreement inconsistent with public policy, or any act required to be done by the plaintiff in violation of law, but, on the contrary, the step-grandmother was desirous of inducing the grandson to abstain from a habit, the indulgence of which, she believed, created a useless expense, and would likely, if persisted in, be attended with pernicious results. An agreement or promise to reform her grandson in this particular was not repugnant to law or good morals, nor was the use of what the latter deemed a luxury or enjoyment a violation of either, and so there was nothing in the law preventing the parties from making a valid contract in reference to the subject-matter.

In the classification of contracts by the elementary writers, it is said: "An agreement by the one party to give in consideration of something to be done or forborne by the other party, or the agreement by one to do or forbear in consideration of something to be given by the other, are such contracts, when not in violation of law, as will be held valid." Whether the act of forbearance or the act done by the party claiming the money was or not of benefit to him is a question that does not arise in the case. If he has complied with his contract, although its performance may have proved otherwise beneficial, the performance on his part was a sufficient consideration for the promise to pay.

The right to enjoy the use of tobacco was a right that belonged to the plaintiff, and not forbidden by law. The abandonment of its use may have saved him money or contributed

to his health; nevertheless the surrender of that right caused the promise, and having the right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to uphold the promise.

Mr. Parsons, in his work on contracts, says: "The subject-matter of every contract is something which is to be done or which is to be omitted," and where the consideration is valuable, need not be adequate: 1 Parsons on Contracts, 7th ed., *489. If, therefore, one parts with that he has the right to use and enjoy, the question of injury or benefit to the party seeking a recovery, by reason of a full performance on his part, will not be inquired into, because if he had the legal right to use that which he has ceased to use by reason of the promise, the law attaches a pecuniary value to it.

If this was an action to recover such damages as the party had sustained by reason of the violation of the covenant or promise, the verdict or judgment would doubtless be nominal only; but where the parties have agreed on the amount to be paid on the performance of certain conditions, when a compliance with those conditions has been alleged and shown, the sum agreed on must be paid. Whether or not the mother of the young man could recover the penalty imposed, on his failure to comply with his undertaking, is not necessary to be decided. It is sufficient to say that the abandonment of the use of tobacco was such a consideration as authorized a recovery of the sum agreed on.

The judgment of the circuit court is reversed, and cause remanded, with directions to overrule the demurrer, and for proceedings consistent with this opinion.

CONTRACT — CONSIDERATION — WHAT SUFFICIENT. — To constitute a valid consideration for a promise, a waiver of a legal right by the promisee at the request of the promisor is sufficient. Therefore a promise by an uncle to his nephew, that if the latter would refrain from drinking liquor, using tobacco, swearing, and playing cards and billiards for money until he was twenty-one years of age, he would pay him five thousand dollars, is founded upon a good consideration: *Hamer v. Sidway*, 124 N. Y. 538; 21 Am. St. Rep. 693, and note.

VEAL v. VEAL.

[89 KENTUCKY, 314.]

HUSBAND AND WIFE. — AGREEMENT BETWEEN HUSBAND AND WIFE that the latter will hold personal property received by him from her father's estate, free from his marital rights, in trust for her as her separate estate, will be upheld in equity against his heirs and distributees.

HUSBAND AND WIFE. — A NOTE GIVEN BY A HUSBAND TO HIS WIFE for moneys received by him for her from her father's estate, under an agreement that he will hold such moneys in trust for her as her separate estate, is valid and binding upon his heirs and representative as evidence of such trust and enforceable as such.

TRUSTS. — STATUTE OF LIMITATION will not run against a note given by a husband to his wife as evidence that he holds certain moneys in trust for her as her separate estate at any time prior to his death, and therefore such note constitutes a claim against his estate, though made twenty-three years before his death.

Beauchamp and Allen, for the appellant.

Kinkead and Darnall, for the appellee.

HOLT, J. October 1, 1865, Dora Veal executed to his wife, the appellee, Susan Veal, his promissory note for \$2,214.78, due one day thereafter. The consideration is not recited in the note. It says "for value received of her." He died testate in 1888. He devised to her what the law gave her merely, and to three of his several children the entire remainder of his estate. The will makes no reference to the note. The administrator *cum testamento annexo* brought this action to settle the estate. The appellee, being made a defendant, asserted the note by a proper pleading. Her answer, among other matters, avers that, about the time a suit was brought to settle her father's estate, her husband agreed with her, if she would allow him to receive what would be coming to her from it, he would hold it in trust for her, and as her separate estate, free from marital rights upon his part; that there was adjudged to her in said suit as a distributee the sum of \$2,214.78; that by reason of the agreement she, by an answer, consented and requested that the money be paid to her husband; that the master's report filed in the cause shows that the money was received by her husband, and that in evidence of the agreement, he executed to her the note.

The record of the suit to settle her father's estate was referred to as a part of her answer, and, by a consent order made in the court below, was made an exhibit in this one. It is not copied, however, in the transcript for this appeal.

The appellant has chosen to bring up a part of the record. This he may do, but at his peril. We must therefore assume that all of the averments of the answer relative to what is shown by the record of the old suit would be sustained by it, were it a part of the record before us.

The reply denies that the agreement named between the appellee and her husband was ever made, and pleads the statute of limitation in bar of any recovery upon the note. A demurrer to it was sustained, and a judgment rendered allowing the note as a debt against the estate.

It is evident the estate is solvent. No question is therefore presented between the widow and creditors, and the inquiry as to error is confined to a consideration of the pleadings, the note, and its legal effect.

It may now be regarded as a settled rule in this state that such an agreement as that relied upon by the widow will be upheld in equity against the heirs or distributees of the husband, and, under proper circumstances, against even his creditors: *Maraman's Adm'r v. Maraman*, 4 Met. (Ky.) 84; *Lattimer v. Glenn*, 2 Bush, 535. It must, of course, be sufficiently established. Here it is urged that the words used in her answer setting forth the agreement having been denied by the reply, the demurrer to it was improperly sustained, and evidence was necessary in support of her plea; in short, that the case should have proceeded to a trial upon testimony. The reply, however, by a failure to deny admits the appellee was the wife of the decedent, the amount coming to her from her father's estate, the receipt of it by her husband, and the execution of the note to her. This admission *ipso facto* establishes a trust in her favor. These admitted facts, in and of themselves, declare that the husband held the fund for the wife. No other reasonable interpretation can be given to them. They indubitably fasten a trust character upon the transaction. He certainly intended something by the execution of the note. It was certainly designed to have some effect. No satisfactory reason can be given for its execution other than that he intended the fund represented by it to remain the separate estate of the wife. If this had not been the purpose, and the parties intended it to become the property of the husband, then no note would have been given. As between the husband and wife, it was not necessary that the note, in order to create in her a separate use, should contain words to that effect, and the only reasonable construction which can

be put upon the admitted facts is, that the parties to the transaction designed a separate use in the wife. The presumption arising from them is conclusive. In and of themselves they establish it. This being so, the plea of limitation is not available. The husband is to be regarded as a trustee of the fund for the wife. He held it for her sole use. This fact he recognized by the receipt of it and the execution of the note to her, and this trust relation continued until his death, and prevented the running of the statute: *Matson v. Matson*, 4 Met. (Ky.) 262.

The demurrer to the reply was therefore properly sustained, and the judgment allowing the note as a debt against the estate is affirmed.

HUSBAND AND WIFE — POSSESSION OF WIFE'S PROPERTY BY HUSBAND — TRUST IN FAVOR OF WIFE. — A resulting trust is created in favor of a wife where there is an agreement between her husband and herself that he will treat her money as her separate estate: *Beam v. Bridgers*, 108 N. C. 276; 23 Am. St. Rep. 59; *Crawford v. Thompson*, 142 Pa. St. 551; *Chadbourn v. Williams*, 45 Minn. 294.

HUSBAND AND WIFE — AGREEMENTS BETWEEN, WHEN UPHELD IN EQUITY. — Courts of equity uphold and enforce contracts between husband and wife when they are fair and just: *Hendricks v. Isaacs*, 117 N. Y. 411; 15 Am. St. Rep. 524, and note; *Pillow v. Sentelle*, 49 Ark. 430; *Bowie v. Stonestreet*, 6 Md. 418; 61 Am. Dec. 318, and note.

PADUCAH LUMBER COMPANY v. PADUCAH WATER SUPPLY COMPANY.

[89 KENTUCKY, 340.]

CONTRACT, WHO MAY SUE THEREON. — A PARTY FOR WHOSE BENEFIT a contract is evidently made may sue thereon in his own name, though the engagement is not directly to or with him.

DAMAGES. — CONTRACT WITH MUNICIPAL CORPORATION TO FURNISH WATER for its use and the use of its inhabitants does not imply that there shall be no damages for a failure to comply therewith, from the fact that it contains a clause showing that the party agreeing to furnish the water may shut it off temporarily, for the purpose of making repairs, without being liable for damages, if he gives previous notice of his intention to so shut it off, and such repairs are made with diligence, and that if it is shut off more than five days, the rents for hydrants shall cease during the suspension, and that if he fails to furnish an adequate supply for five months, then the contract is to be void.

DAMAGES FOR BREACH OF A CONTRACT SHOULD BE SUCH as may fairly and reasonably be considered as arising naturally, — that is, according to the usual course of things from such breach, — or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of its breach.

DAMAGES. — WHERE A PARTY UNDERTAKES TO FURNISH WATER IN SUCH MODE AND QUANTITY that it may be used to extinguish fires in the city in which it is to be supplied, damages sustained by the destruction of buildings by the failure to so furnish such water is a natural and proximate consequence of such breach of the undertaking.

MUNICIPAL CORPORATION, RIGHT OF TAX-PAYER TO RECOVER FOR DESTRUCTION OF HIS PROPERTY BY FIRE, THROUGH FAILURE OF CONTRACTOR TO FURNISH WATER. — If a water company enters into a contract with a municipal corporation, whereby the former agrees, in consideration of the grant of a franchise and of a promise to pay certain specified prices for the use of hydrants, to construct water-works of a specified character, force, and capacity, and to keep a supply of water required for domestic, manufacturing, and fire protection purposes for all the inhabitants and property of the city, a tax-payer of the city may recover of the water company when, through a breach of its contract, he is left without means of extinguishing fire, and his property is on that account destroyed.

Husbands and Husbands, and Gilbert and Reed, for the appellant.

Burnett and Dallam, for the appellee.

LEWIS, C. J. The buildings, machinery, and other property of appellant, a corporation engaged in the lumber and planing-mill business in the city of Paducah, having been in 1887 destroyed by fire, it instituted this action to recover damages therefor of appellee, also a corporation, and the city of Paducah, having, as alleged, refused to join as plaintiff, was made likewise defendant to the action, though no recovery against it is sought.

In the petition it is stated, in substance, that in consideration of the grant by the city of Paducah to appellee, as assignee of one Jones, of the franchise and right to construct, maintain, and operate, for the term of forty years, water-works, including the laying of pipes and erection of hydrants in all the streets, avenues, and public grounds of the city, and agreement to pay forty dollars annual rent for each of one hundred and fifty hydrants, besides the privilege given to charge and collect of the inhabitants limited rates for private use of water, appellee agreed to erect upon a platform fifty feet high a stand-pipe twenty-two feet in diameter and one hundred and seventy-five feet high, with which was to be connected the conducting pipes and hydrants mentioned and also two pumping-engines, each having capacity to force into the stand-pipe two million gallons of water every twenty-four hours, and to keep a head of water sufficient to throw from any eight of the hydrants simultaneously, and

for five consecutive hours at any one period of time, streams through fifty feet of hose one hundred feet high, all of which works were completed and put in operation in 1885; that appellee also agreed to have in the stand-pipe and conducting pipes, at all times, a supply of water sufficient to afford a head or pressure requisite for all domestic, manufacturing, and fire-protection purposes for all the inhabitants and property of the city, and to increase the number and length of hydrants and pipes when necessary to meet demands of the city and citizens; that said contract was made with appellee by the city of Paducah for the use and benefit of all its property-owners and inhabitants, and appellant's property was, from 1885 until destroyed by fire, in common with that of others, taxed at its full value, to raise money with which to pay said hydrant rents.

It is further stated that, under a contract directly between them, there had been erected, previous to the fire, on the same lot where the burned property was situated, two hydrants, one within thirty and the other seventy feet of the place where the fire originated, and connected by pipes with the water-main, to be used by appellant to extinguish fires and for steam purposes, for which it had been paying rent to appellee, and that in consideration thereof, appellee had agreed to furnish, and have ready at all times, water sufficient to throw streams through hose kept by appellant in proper condition, to be connected with the two hydrants, the height provided for in said contract between appellee and the city of Paducah; that the fire originated in a wood building situated on the lot of appellant, and connected with its other property, though occupied at the time by another; but said fire occurred without any fault or negligence of appellant or its servants, and it could and would have been extinguished before doing damage to the property of appellant if there had been the stipulated quantity of water in the stand-pipe and conducting pipes, or the pumping machinery had been in readiness to operate, and the engineer and servants of appellee had been present to set it in motion; for immediately after the fire commenced, and before it had done any damage, or extended to the premises then occupied by appellant, hose-pipes, in good order, were attached to the two private hydrants, and carried to within five or six feet of the fire, for the purpose of applying water to it. There were, besides, four or five double-nozzle fire-hydrants, one within twelve, two within sixty, feet of

the property burned, and all near enough to extinguish fire on any part of said lot, and experienced firemen, employed by the city of Paducah, were present on the ground within ten minutes or less after the fire started, and had hose suitable and in good condition attached to the hydrants; but that, notwithstanding it had, since 1885, been receiving from the city of Paducah the agreed hydrant rent, and from numerous inhabitants thereof, appellant included, large sums of money for water furnished to them, appellee, in violation of said contract, and without excuse, refused and neglected to have, when said fire commenced, the stipulated quantity of water in the stand-pipe, and for more than one hour after the alarm was given, and the city firemen had arrived and attached hose to the hydrants, neglected to start the pumping machinery, or to have its engineer or other servant present for the purpose, so that, although when water was in the stand-pipe at the height of seventy-five feet, streams could be forced through hose attached to the two private hydrants seventy-five feet high, and higher when pressure was applied by the pumping machinery, the streams passing through the hose, when applied at incipieny of the fire, did not reach ten feet, and were so weak as to be utterly useless, nor was there sufficient head of water to force a stream through any kind or length of hose as much as twenty-five feet, by reason of which refusal and neglect appellant's property was burned and destroyed.

The grounds of demurrer are, in substance, that the facts stated in the petition and amendments do not constitute a cause of action in favor of the plaintiff against the defendant, which we will treat as involving two questions: 1. Whether there is vested in the plaintiff, appellant, such legal interest in the contract between the city of Paducah and the defendant, appellee, as to authorize it, in any event, to prosecute an action in its own name and for its own benefit; 2. Whether appellee can be legally made liable in damages for the alleged breach of contract.

Clearly, appellant had a right to sue for a breach of the distinct contract set out in the petition, by which, in consideration of rent paid for use of the two hydrants on its own lot, water was agreed to be furnished directly to it by appellee. But we will consider the two questions just stated as they arise on the contract between appellee and the city of Paducah.

Authorities in some of the states hold the general rule to be, that the plaintiff in an action on contract must be a person from whom the consideration actually moved, and that a stranger to the consideration cannot sue on a contract. But we think if there be in fact consideration for a promise or engagement made for the benefit of the person who sues, it is not essential for it to have passed directly from him to the person sued. It is not, however, important whether this case either comes within what is elsewhere laid down as a general rule, or is an allowable exception to it; for this court has held the doctrine well settled, a party for whose benefit a contract is evidently made may sue thereon in his own name, though the engagement be not directly to or with him: *Smith v. Lewis*, 3 B. Mon. 229; *Allen v. Thomas*, 3 Met. (Ky.) 198; 77 Am. Dec. 169; which practice is not only in accordance with the rule found in Chitty's Pleading, but seems to be required by section 18, Civil Code, that in express terms provides every action must be prosecuted in the name of the real party in interest, except that, under section 21, a fiduciary or trustee may bring an action without joining with him the person for whose benefit it is prosecuted.

It thus follows that if the city of Paducah had power to make the contract as well for the personal benefit of its several inhabitants as for purely municipal purposes, and did so make it, appellant, being the real party in interest, became owner of the property destroyed, has the right to prosecute the action in its own name, if maintainable at all, and the city of Paducah, though made so, is not even a necessary party, because whatever interest it may have, or injury it may have sustained, is entirely distinct, if not remote.

Conceding, as must be done, existence of the alleged power of the city of Paducah under its charter to enter into a contract with another for construction and operation of water-works, the right and also duty attached to make it for the personal benefit of inhabitants within its corporate limits; for supply of water in a city for domestic and manufacturing purposes, and as safeguard against injury to or destruction of private property by fire, is always in such cases the main inducement, the need of the municipal corporation itself for water supply being comparatively little. Besides, it is manifest the principal source of expected profit to appellee was the money to be collected by imposition of the special taxation, and for private use of water with which to pay for service

in supplying it for use of the inhabitants and protection of their property from effects of fire. And it being alleged in the petition, and also in effect provided in the ordinance of the city council that contains the terms and conditions of the contract, that it was made for the benefit of the inhabitants, it seems to us that if appellee can be made answerable in damages at all, it is liable to appellant upon the facts stated in the petition.

It is a rule co-existent with contracts that a party who has performed his part is entitled to reparation in some form for breach to his injury by the other. In equity, he may sue for specific performance or rescission, neither of which is an appropriate or adequate remedy when the subject-matter of a contract is destroyed and no longer exists; but at the common-law, where an actual injury to one of the parties has been caused by refusal or neglect of the other to do what he agreed to do, and received consideration for doing, damages commensurate with the loss thereby sustained may be recovered, and such right of recovery cannot be regarded waived or relinquished unless clearly so provided in the contract.

It is not provided in the ordinance referred to, nor can it be fairly inferred, that appellee was not to answer in damages for its failure or refusal to perform its contract. The provision on that subject is, that appellee shall have the right to shut off water temporarily for the purpose of making repairs or extension of the works, and shall not be liable for any damages occasioned by such temporary suspension, provided notice is given of the intention to shut off the water, and such repairs or extension are made with due diligence and without delay; but that if at any time the supply is shut off from any cause for more than five days, rent for the fire-hydrants shall cease during the period of such suspension. It is further provided that if appellee fail for five months to furnish an adequate supply of water for fire, or other public or private purposes, the contract is to be void and the franchise forfeited. As, under the contract, exemption from liability in damages for shutting off or suspending the water supply exists only when done for the special and temporary purpose of making repairs or extension of the works, and not then unless notice is given, and such repairs and extension are made with due diligence and without delay, the necessary inference is, that appellee was intended to be, and according to a fair interpretation must be, regarded liable, in the absence

of such excuse; for, manifestly, neither the provision for rent of the fire-hydrants to cease in case of a longer than five days' suspension of the water supply for the particular purpose mentioned, nor the reserved right of the city of Paducah to rescind the contract for the cause stated, was intended by the parties, or can be properly construed, to release appellee from liability, or deprive the city of Paducah or its inhabitants of remedy for non-performance of the contract while it is in force. The rule laid down in the leading case of *Hadley v. Baxendale*, 9 Ex. 353, is, that "when two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered as arising naturally, — that is, according to the usual course of things, from such breach of contract itself, — or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of a breach of it." This rule, which has been generally adopted and approved in the United States, is applicable and useful in determining the question of legal liability as well as in fixing the measure of damages in case of breach of contract; "for parties, when they enter into contracts, may well be presumed to contemplate the ordinary and natural incidents and consequences of performance and non-performance": 1 Sutherland on Damages, 77.

It is, however, argued the damage sustained by appellant was not the natural and proximate consequence of the neglect complained of, and therefore no recovery can be had, and the case of *Patch v. City of Covington*, 17 B. Mon. 722, 66 Am. Dec. 186, is cited to sustain the position. There the action was to recover in damages the value of a house destroyed by fire in consequence of failure on the part of the city of Covington to keep its public cisterns in repair, and to provide the fire company with hooks, ladders, and other necessary apparatus. The fire originated in a building adjacent to that of the plaintiff; the firemen had reached the house before the flames were communicated to it, and, as alleged, would have been able to save it, but for neglect of the city to keep sufficient water in the cistern. But the judgment dismissing the action was affirmed, on the ground the cause of plaintiff's loss "was wholly disconnected from and independent of the city or its acts or omissions." That, unlike this, was an action against a municipal corporation for

failure to perform what, at most, was an implied public duty, which, upon other than the grounds just mentioned, courts in several states have held cannot be maintained. But whether the conclusion there reached was or not proper, the reason for it was not entirely pertinent; for while in one sense the fire, which in that as in this case originated in an adjacent building, was the proximate cause of the house being destroyed, the complaint was, not that the defendant was in any way responsible for the occurrence of it, but failed to perform what was assumed to be its contract duty to furnish water in cisterns with which to extinguish it, the immediate consequence of which failure was, as alleged, loss of the building. There is a clear distinction between occurrence of a fire, the origin of which is often unknown, and for which usually there attaches no legal liability to any person, and the extinguishment of it, which generally can be accomplished by application of water, that a party may, by contract, undertake and bind himself to supply in specified manner and time. It does not, therefore, make any difference in this case how or where the fire originated, provided appellant did not cause it, because the duty of appellee was, not to prevent occurrence of it, but to keep the stipulated quantity of water in readiness to be applied to put it out.

Water-works, however costly and skillfully constructed and operated, are not potent enough to extinguish, with absolute certainty and at all events, every fire occurring in a city before destruction of, or serious injury to, the property ignited, nor are they ever made with such end in view; but it is entirely practicable, by that means, to supply water in such quantity and having such head or pressure as to usually extinguish a fire before serious damage is done, when promptly and efficiently used; and parties to a contract like this must be presumed to have contemplated and agreed that such, in the natural order of things, would be the probable effect of a performance of it, else there would have been no rational motive nor adequate consideration for entering into it. But the degree of probability in every such case as this must, of course, depend upon the stage of the fire when water is applied, upon the efficiency of the firemen, and all other attendant circumstances and agencies favorable or adverse to arresting or extinguishing fires.

It seems to us, if the contract before us is not to be treated as meaningless, and totally ineffectual for every purpose, the

parties to it must be regarded as having contemplated and assented to the consequences of non-performance, as well as the profit and advantage of performance, and, consequently, appellee is liable in this case for such damages as its failure or refusal to perform may have caused to appellant. The inquiry, therefore, is, whether, considering the purpose, character, and capacity of the water-works, and all the attending circumstances and agencies, the fire which destroyed appellant's property could and would have been prevented or extinguished before doing damage, if appellee had performed its contract; and as the facts alleged in the petition and amended petition constitute a *prima facie* cause of action, the lower court erred in sustaining the demurrer.

Wherefore the judgment is reversed and remanded, with directions to overrule the demurrer, and further proceedings consistent with this opinion.

To a petition for rehearing, the following response was delivered: —

LEWIS, C. J. It is not necessary to even consider whether a municipal corporation can be made liable for destruction by fire of property of its individual inhabitants, because that question is not before us. But even assuming no action could be maintained in that case, still, the doctrine of *respondeat superior* would not, as contended, avail to relieve appellee of its own liability, because the relation of principal and agent does not exist in any sense between the city of Paducah and it. On the contrary, they entered into a contract by which, for a valuable consideration, to be paid by taxation and by rents for private use of hydrants, appellee agreed, among other things, to keep a specified quantity of water in its stand-pipe at all times, except on particular occasions mentioned, none of which existed when appellant's property was burned. It is too plain for discussion, that the city of Paducah had the power, and did make the contract for benefit of its inhabitants, and consequently each one of them has a right to sue and recover for an injury caused to him by breach of it.

Appellee did not covenant to prevent occurrence of fires, nor that the quantity of water agreed to be furnished would be a certain and effectual protection against every fire, and consequently does not in any sense occupy the attitude of an insurer; but it did undertake to perform the plain and simple duty of keeping water up to a designated height in the stand-

pipe, and if it failed or refused to comply with that undertaking, and such breach was the proximate cause of destruction of appellant's property, which involves questions of facts for determination of the jury, there exists no reason for its escape from answering in damages that would not equally avail in case of any other breach of contract.

Petition for rehearing overruled.

CONTRACTS — WATER COMPANY — LIABILITY FOR FAILURE TO SUPPLY WATER. — One who contracts with a city to furnish water therefor for the purpose of extinguishing fires is not liable to a tax-payer for a failure to furnish the water: *Fowler v. Athens etc. Co.*, 83 Ga. 219; 20 Am. St. Rep. 313, and note. See note to *Becker v. Keokuk Water-works*, 18 Am. St. Rep. 380, in which this case is discussed, and the opinion of the court on rehearing given, under the mistaken impression that the court had directed the case not to be officially reported.

CONTRACTS — MEASURE OF DAMAGES FOR BREACH OF. — One who violates his contract with another is liable for all the direct and proximate damages which result from such violation: *Stanton v. New York etc. R'y Co.*, 59 Conn. 272; 21 Am. St. Rep. 110, and note. See *Wiley v. Athol*, 150 Mass. 426; *Cohn v. Norton*, 57 Conn. 480.

KINNAIRD v. STANDARD OIL COMPANY.

[89 KENTUCKY, 468.]

UNDERGROUND WATERS, RIGHT TO POLLUTE. — The owner of land has no right to pollute underground waters running therein which, when they leave such land, flow into a spring on the land of an adjacent proprietor. Hence if the owner of land, or his tenant, erects a warehouse, and places and keeps coal-oil therein, which, leaking from the casks, saturates the ground, and pollutes a subterranean stream from which a spring on the land of an adjacent proprietor is fed, the latter may maintain an action for damages thus suffered by him.

NUISANCE, LIABILITY FOR, BY ONE HAVING NO NOTICE OF THE RESULTING INJURY. — One who, on his land, maintains a warehouse for the storage of coal-oil, and permits it to leak from casks and penetrate the ground and contaminate an underground stream of water, from which a spring on the land of an adjacent proprietor is fed, is answerable for the damages thus occasioned, though he did not know of the injury which the percolation of the oil was doing to the spring.

NUISANCE — DAMAGES FOR, UP TO WHAT TIME SHOULD BE ESTIMATED. — In an action for polluting a spring by suffering coal-oil to percolate into an underground stream from which the spring was fed, the damage recoverable is that which resulted from the deprivation of the use of the water for domestic or fire purposes up to the time of the trial only, where it is in the power of the defendant to prevent the continuance of the injury.

M. H. Owsley, R. H. Tomlinson, and W. J. Landram, for the appellant.

Brown, Humphrey, and Davie, for the appellee.

PRYOR, J. The appellant, Kinnaird, is the owner of a small tract of land, containing about four acres, lying adjacent to or within the boundary of the town of Lancaster, in the county of Garrard. On this land is a valuable and never-failing spring that appears upon the surface of the ground at the foot of a hill, and had been used as such for a long period of time.

In November of the year 1836, the appellee, the Standard Oil Company, leased from the Kentucky Central Railroad Company a site upon which to build a warehouse for the storage of its coal-oil. They erected the warehouse, and placed in it their coal-oil, that leaked from the casks and saturated the ground both on the inside and the outside of the building. The floor of the house consisted of a bed of cinders, about twelve inches in depth, that supplied the place of plank, that, as the proof shows, would become very inflammable when saturated with the oil. The bed of cinders, therefore, rendered the property much more secure than if a floor had been laid in the building. The spring of the appellant is located about two hundred yards from the oil-house of the appellee, with a hill or rise in the ground between the two, and the proof conduces to show that water on the surface of the ground at the oil-house would naturally flow in an opposite direction from the spring, because it is lower than the ground where the spring emerges from the hill. After the oil had been deposited in the building erected for that purpose, it is manifest that it leaked from the casks, and, being of a penetrating character, it passed into the ground and polluted the stream from which the spring of appellant was supplied.

While it is argued that the proof on this subject is by no means satisfactory, we think it apparent from the testimony that the oil mingled with underground currents of water that fed the spring of the appellant, and caused the injury. The court below, on hearing the testimony, gave a peremptory instruction to the jury, on the ground that no action could be maintained for contaminating the subterranean water that flowed into the spring of the appellant, as the appellee had the right, in the exercise of its legitimate business, to build the house and store the oil within it on its own land, although

the property of his neighbor was injured by it. If this had been surface water, or a vein of water underground, with a well-defined and known channel, the right to maintain the action cannot be doubted; but as to hidden or unknown veins of water, it is said they belong to the soil, constitute a part of it, and may be used, controlled, or removed by the owner in the same manner that he could the soil through which the water percolates or runs.

The theory of the defense is, that this water being the property of the owner of the land, its use, if not forbidden by law, cannot work an injury to his neighbor, in the absence of a desire to do so, however great the damage sustained. This view of the legal rights of these parties seems to be sustained by numerous reported cases involving questions analogous in almost ever particular, and if followed by this court, it must be held that the peremptory instruction was proper. The case of *Brown v. Illius*, 27 Conn. 84, 71 Am. Dec. 49, was an action on the case for a nuisance, and in the declaration it was alleged that offensive matter in the manufacture of gas, deposited on the surface of the ground, had penetrated into the soil around and adjoining the well, and into the well itself, corrupting the water and rendering it unfit for use. The court, in applying the rule in regard to subterranean currents, and in discussing the instruction given by the lower court, held that the ownership of the land sanctioned and justified the use made of it by the defendant, and although the latter was injured, if the damage resulted from the mingling of the noxious matter with the underground vein of water, it was an injury without any violation of the plaintiff's legal rights by the defendant, and the latter "was under no legal obligation to prevent it in the first instance or a continuance of it afterwards." The rule that gives to the owner of the soil all that lies beneath its surface, whether soil or water, was made to apply in the case cited, with the right of the owner to use it at his pleasure and in any legitimate mode, and the plaintiff denied the right of recovery upon that ground. The case of *Dillon v. Acme Oil Company*, 49 Hun, 565, was where the plaintiff owned two lots upon which he had erected dwellings, and had dug a well on each lot, that he used for household purposes. The defendant erected an oil refinery about three hundred feet distant from the lots of the plaintiff, and the oil, leaking on the surface, had penetrated the ground until it reached some underground stream that carried it to

the wells of the plaintiff. An injunction was sought, and the relief denied, for the reason that the defendant had the right to use that which he owned for legitimate purposes, provided in doing so he exercised proper care and skill to prevent injury to others, and, as an illustration of the rule, it was then said that he might dig a well or ditch and cut off a hidden stream of water that supplied his neighbor's well, and thereby render it useless. In *Bloodgood v. Ayres*, 108 N. Y. 400, 2 Am. St. Rep. 443, it was also held that no person is liable for interrupting a stream supplying a well or spring unless he knew beforehand where the stream was. We think it well settled by an unbroken line of authority, that one may divert or consume all the water from underground currents that have no fixed, known channels, and appropriate all the water to his own use; and that he is the absolute owner of this water while it remains under his soil, with the right to appropriate it as he pleases for legitimate use, will not be denied. This use or right of property is, however, only temporary, and remains only so long as the water stands on or under his land. He cannot follow it when it leaves his premises and passes to the land of his neighbor, and it may therefore be said that he has not the absolute title, as each owner of the land is vested with the right to use the water and appropriate the whole of it when it reaches him.

In the case of *Upjohn v. Richland Township*, 46 Mich. 542, 41 Am. Rep. 178, the opinion delivered by Mr. Justice Cooley, it was held to be an established rule, "that owners of the soil have no rights in subsurface waters not running in well-defined channels, as against their neighbors, who may withdraw them by excavations; and therefore, if no right of action exists for ruining the plaintiff's well by withdrawing the water, it is difficult to understand how corrupting its waters, by a proper use of the adjoining premises, can be actionable, when there is no intent to injure and no negligence," as each act would destroy the well of the plaintiff.

It seems to us, after a careful review of the authorities referred to by counsel for the corporation, all of which are entitled to great weight, that there is a manifest distinction between the right of the owner of land to use the underground water upon it that originates from percolation, or is found in hidden veins, and the right to contaminate it so as to injure or destroy the water when passing to the adjoining land of his neighbor. It is a familiar doctrine, that one must so

use his property as not to injure his neighbor; and because the owner has the right to make an appropriation of all the underground water, and thus prevent its use by another, he has no right to poison it, however innocently, or to contaminate it, so that when it reaches his neighbor's land it is in such condition as to be unfit for use, either by man or beast. One may be entitled, by contract with his neighbor, to all the water that flows in a stream on the surface that passes through the land of both; and while he can thus appropriate it, he has no right to pollute the water in such a manner as when it passes to his neighbor its use becomes dangerous or unhealthy to his family, or to the beast on his farm.

As soon as the water leaves the land of the one who claims the right to use it, and runs on the land of another, the latter has the same right to appropriate it; and if property, it then becomes as much the property of the last as the first proprietor. The owner of land has the same right to the use and enjoyment of the air that is around and over his premises as he has to use and enjoy the water under his ground. He is entitled to the use of what is above the ground as well as that below it; and still it will scarcely be insisted that he can poison the atmosphere with noxious odors that reach the dwelling of his neighbor, to the injury of the health of himself or family; if not, we see no reason why he should be permitted to so contaminate the water that flows from his land to his neighbor, producing the same results, and still escape liability for the damages sustained; and whether the water escapes the one way or the other is immaterial. The simple question is, Can the owner, with a knowledge of the penetrating character of its oil, and the effects following its leakage, store large quantities of it near the spring of the plaintiff, where the oil is seen in puddles outside of the building, the result of leakage of the casks on the inside, and then resist the claims of the plaintiff, on the ground that it did not know the water was affected by it? The injury has been done, and can it be said that it presents a case of *damnum absque injuria*? We think not. The case of *Ballard v. Tomlinson*, 26 Ch. Div. 194, contains the correct rule on the subject. In that case the water in the plaintiff's well was injured by sewage from the defendant's well, and it was held that an injunction to restrain the defendant from so using his well was proper, and the plaintiff entitled also to damages he had suffered by reason of the pollution. While the unlimited right to use the percolating

water was conceded to the plaintiff, the right to contaminate the water so as to render it unhealthy or unfit for use when it came to his neighbor's land was held to be a violation of the plaintiff's right, for which an action could be maintained. If one has that on his own premises that is dangerous, or a substance that he is constantly using which is liable to escape and injure others, whether above or under the ground, and upon the property of his neighbor, or that which his neighbor has the right to use, he must answer for the consequences. A recovery was had against gas companies in the cases of *Ottawa Gas etc. Co. v. Graham*, 28 Ill. 74; 81 Am. Dec. 263; *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257; *Columbus Gas etc. Co. v. Freeland*, 12 Ohio St. 392.

In the case reported in 28 Ill. 74, the gas company erected works near the dwelling of Graham, and injured the water in his well by permitting the substances used in its manufacture to permeate the soil and find its way to plaintiff's well. The court told the jury that if such substances did soak into the ground, and permeate and pass along and through the earth, mingling with the water of the well, and did thereby render it nauseous to the taste or unfit for use, the jury should render a verdict for the plaintiff. This branch of the instructions was held to be proper, and no question raised as to the right of recovery, if the jury believed the facts existed, as alleged and proven. In *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257, the court held the company answerable for the corruption of the plaintiff's well, by reason of fluids percolating from the works. The entire dominion of the defendant over its property in the present case is undenied; but it had no right while enjoying its use, although in a legitimate way, to violate, by the manner of its use, the rights of others. It seems to us unreasonable to adjudge that the erection and operation of gas-works, or buildings for the storage of oil, with the noxious and injurious substances, by reason of the deposit on the surface, permeating the ground, and injuring or destroying the taste or use of water belonging to and on the property of others, is such a legitimate use of one's property and his dominion over it as to preclude any recovery for an injury to the property of his neighbor, however great; and to require a notice that the injury has been inflicted before the action can be maintained would be to destroy the theory or the principle upon which a recovery in this case is permitted. It is argued that the appellee was ignorant of the existence of the nuisance,

or the injury to appellant's spring, and had no right to suppose that its oil was affecting the water in the spring of the plaintiff. This may be so, and still the defendant is responsible for the injury, although he was not aware that its neglect in permitting the oil to leak from the casks and stand in pools outside the building had or would work an injury to the plaintiff. If a nuisance, whether neglect or not, the appellee is liable. We have assumed, in the consideration of the questions presented, that the injury complained of resulted from the manner in which the oil was kept in the storehouse of the defendant; but we are not to be understood as taking that question from the jury on the return of the case.

Some question was made in the court below as to the right of the plaintiff, in estimating the value of his spring or the damages occasioned by the act of the defendant, to show that years before he had sold water from it. This testimony was properly excluded. We do not understand that the injury has resulted in the entire destruction of the spring or the water for use, and for that reason the actual damage is the criterion of recovery, — the deprivation of the use of the water for domestic or farm purposes up to the time of the trial. The continuance of the use of the building for the purpose of storing the oil, without any additional protection to the flow of the oil to the spring of the plaintiff, would subject the appellee to another action. We cannot well see how the plaintiff can be fully compensated in any other mode; and to make the injury permanent, when it is certainly in the power of the defendant to prevent it, would be subjecting it to the payment of damages, although the beneficial use of the spring had been again restored.

Judgment reversed, and remanded, with directions to award a new trial, and for proceedings consistent with this opinion.

UNDERGROUND WATER.—POLLUTION OF.—NUISANCE. — To suffer filthy water to percolate or filter through the soil into the land of a contiguous proprietor, to the injury of his well, is actionable nuisance: *Ball v. Nye*, 99 Mass. 582; 97 Am. Dec. 56, and note; *Haugh's Appeal*, 102 Pa. St. 442; 48 Am. Rep. 193, and note; *Pensacola Gas Co. v. Pebley*, 25 Fla. 381. See *Collins v. Chartier's V. Gas Co.*, 131 Pa. St. 143.

TOWN OF BELLEVUE v. PEACOCK.

[89 KENTUCKY, 495.]

CONSTITUTIONAL LAW. — RETROSPECTIVE LAW, if conformable to natural justice, will be recognized and enforced. Therefore a law which binds a party by a contract into which he had attempted to enter, but which is invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, is not unconstitutional.

CONSTITUTIONAL LAW. — STATUTE CREATING A LIABILITY against the owner of an abutting lot for an improvement for which, when made, its owner was neither legally nor equitably liable, is unconstitutional, and where the improvement was done under a contract entered into by a town, providing for its payment at the cost of the abutting land-owners, but the charter of the town did not give it the power to improve the street at the cost of such owners.

John S. Ducker, for the appellant.

R. W. Nelson, for the appellees.

HOLT, J. In 1875 the appellant, the town of Bellevue, entered into a contract with Hahn and Trapp for the improvement of a street, by the terms of which the latter were to look for their pay to assessments upon the abutting property only, save the cost of street intersections was to be paid by the town. Both parties to the contract then believed the charter of the town conferred the power to impose the cost of the improvement upon the abutting property. The assessments were to be collected in the name of the town. The work was properly done, and received by the town. Some of the abutting lot-owners failed to pay their assessments. The town sued to enforce their collection. This court held that the appellant's charter did not give the power to improve a street at the cost of the abutting lot-owners: *Doyle v. Trustees of Bellevue*, 1 Ky. Law Rep. 168. Hahn and Trapp then sued the town; but this court, after express allusion to the fact that they had agreed they would not, in any event, look to the town, save for the cost of the intersections, and which had been paid, decided that no implied promise arose upon the part of the appellant to pay for the work, because of the non-liability of the lot-owners: *Trustees of Bellevue v. Hohn*, 82 Ky. 1. February 14, 1888, the legislature, by what may be termed an attempted healing act, sought to validate the contract between Hahn and Trapp and the town by giving to the latter a lien for the benefit of the former upon the lots abutting the improvement, *pro rata*, for the assessment, and providing for the enforcement thereof in the event of non-payment by the

owners. The appellees, Peacock and Thee, are two of them. Failing to pay, by consent of parties the one action was brought against them.

It having been decided below upon demurrer to the petition, its averments as amended must be taken as true. From them it appears that Thee was the owner of his lot, and has been ever since the making of the contract between the town and Hahn and Trapp. Peacock purchased his, however, since then, and since the decision of this court holding that the lot-owner was not liable, but with knowledge that Hahn and Trapp made the improvement, and had never been paid for it. The validity of the act is involved. It must be borne in mind that it does not impose upon the town the payment of a just claim for which an equivalent has been received, but which, owing to some irregularity or omission in the proceeding creating it, cannot otherwise be enforced at law. Such a case would be very different from that now presented. Undoubtedly, the claim is a just one as against the town. It has received a full equivalent, and that natural obligation which rests upon all persons, whether acting collectively or individually, to do right and deal fairly, should prompt it to see that this debt is paid. This act does not, however, look to payment by the town. It is not an enabling one for that purpose.

Our state constitution does not forbid retrospective legislation *co nomine*, and there is no doubt the legislature has the power to pass a law which reaches back and changes or modifies the effect of a prior transaction, if there be no other objection to it than its retrospective character. If it merely aid in the enforcement of an existing obligation, and divests no vested right, it is not open to constitutional objection.

Cooley, quoting from an approved case, says: "A law, although it be retrospective, if conformable to entire justice, this court has repeatedly decided, is to be recognized and enforced."

Again: "On the same principle, legislative acts validating invalid contracts have been sustained. When these acts go no further than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, the question which they suggest is one of policy, and not of constitutional power": Cooley's Constitutional Limitations, 372-374.

Thus a statute imposing a tax for and directing payment of a claim against a city is not invalid or unconstitutional because the claim is not recognized by the law as a legal obligation; and it has been declared that a legislature may compel a municipal corporation to recognize and pay a claim not binding in strict law, and which, for technical reasons, cannot be enforced in equity, but which is, nevertheless, just and equitable in character, and supported by moral obligation: Note to *Hasbrouck v. City of Milwaukee*, 80 Am. Dec. 733.

This rule is, however, to be carefully restricted to the original contracting parties, and such others as may have succeeded to their rights with no greater equities; and Mr. Cooley says, on page 369 of the work just cited: "So he who was never bound, either legally or equitably, cannot have a demand created against him by mere legislative enactment."

The statute now in question is not merely remedial in its character. When the contract was made for the improvement of the street, no right existed to look to the abutting lot-owner for payment. By the general law he was not liable. The statute alone in such a case creates his liability. If A or B, subsequent to the improvement, purchased lots adjoining it, their property would certainly not be liable for its cost, in the absence of a statute so providing; and this is equally true, although the purchase was made with knowledge that the party making the improvement had not been paid. Especially would this be so if the highest judicial authority of the jurisdiction had already held that the property was not liable. It is equally true that a person who owned an abutting lot when the contract for the improvement was made, and yet owns it, may defend against the statute in question. When the contract was entered into, the town had no authority, express or implied, to bind his property for the cost of the improvement, and when the statute, by virtue of which relief is now asked, was enacted, there was no pre-existing right as against him, or to look to his property. In short, the legislature, by this act, has attempted to afford a remedy against a party as to whom no right, legal or equitable, existed.

It was said in the case of *Hasbrouck v. City of Milwaukee*, 13 Wis. 37, 80 Am. Dec. 718: "It [the legislature] would, of its own mere motion, create an obligation, where by law none before existed. It would impose a liability against the will and without the consent of the party to be charged. This the legislature cannot do. It can only act retrospectively for the

purpose of furnishing a remedy for or removing an impediment in the way of the enforcement of some pre-existing legal or equitable right or duty, and not for the purpose of creating such right or duty."

If legal or equitable rights or obligations have arisen between the parties to a transaction, have grown up out of their previous lawful acts, and exist independently of some want of formality or irregularity which prevents their enforcement, then the legislature may provide a remedy, but it cannot provide for the enforcement of a non-existing right.

The statute in question was, no doubt, enacted through a laudable legislative desire that justice should be done, and for this reason, as well as the fact that manifest justice would be done by paying the parties who made the improvement, we would gladly uphold it if consistent with our sworn duty.

Not being so, and the views of the lower court being in accord with those above expressed, its judgment is affirmed.

CONSTITUTIONAL LAW — RETROSPECTIVE LAW. — A statute curing defects in deeds or other instruments is valid: *Grim v. Weissenberg S. Dist.*, 57 Pa. St. 433; 98 Am. Dec. 237, and note. The legislature may validate an irregularly organized corporation: *Mitchell v. Deeds*, 49 Ill. 416; 95 Am. Dec. 621. Contract void for want of capacity of one of the parties cannot be given vitality against the wishes of either of the parties to it: *Hasbrouck v. Milwaukee*, 13 Wis. 37; 80 Am. Dec. 718, and note discussing the power of the legislature to validate invalid contracts. Retrospective legislation is not prohibited by the constitution of Kentucky, except in cases impairing the obligation of contracts: *Henderson etc. R. R. Co. v. Dickerson*, 17 B. Mon. 173; 66 Am. Dec. 148, and note. And the rule is the same in South Carolina: *Henry v. Henry*, 31 S. C. 1.

SPENCER v. PARSONS.

[89 KENTUCKY, 577.]

JUDGMENT AGAINST A MARRIED WOMAN upon a claim not authorizing a personal judgment against her is void, and no proceeding to reverse or vacate it is necessary, to entitle her to successfully resist its enforcement, where it does not appear that she set up her coverture as a defense to the action, and that the court, before rendering judgment, passed upon such defense.

Harrison and Belden, for the appellants.

Samuel Avritt, for the appellees.

HOLT, J. This is an effort to enforce a judgment against the separate property of a married woman, rendered when she was such *feme covert*. The lower court, upon demurrer to

the petition, dismissed the action. This court, upon appeal, said, in substance, that the judgment sued upon might or might not be void. If based upon her tort, or a contract executed by her *dum sola*, or rendered when she was a *feme sole*, it would not be void; but if founded upon a claim of such a character as would ordinarily support only an ordinary action, then, as it would be void as to her, so would any judgment against her upon it. This view was taken after as careful an examination and consideration of the authorities as was possible, and the opinion of the court will be found in *Parsons v. Spencer*, 83 Ky. 305.

As the character of the claim upon which the judgment had been rendered did not appear from the petition, this court reversed the judgment dismissing it, and remanded the cause for further preparation. The issues having been formed by proper pleading, and a part of the record of the suit in which the judgment sought to be enforced was rendered being in evidence, the lower court rendered a decree enforcing the judgment against the property of the *feme covert*, and she has appealed.

The record of the old suit, filed in this one, sufficiently identifies it as the action in which the judgment sued upon was rendered. The pleadings in this suit give the style of the action and the court in which the judgment was rendered, and the record in evidence conforms thereto. It shows, also, that the claim was not of a character authorizing the personal judgment against the female appellant, who was then a married woman, and the question is therefore presented, whether she can now resist its enforcement against her property upon the ground that it is void by reason of her coverture when it was rendered. The opinion upon the former appeal substantially decided the question. It is contended, however, with earnestness and ability, that it must be treated as erroneous only; that it cannot, therefore, be assailed collaterally, and the party can obtain relief from such a judgment only by vacating it by a direct proceeding, or by an appeal. The proceedings authorized by our code of practice for reversing or vacating a judgment apply where it is merely erroneous, and therefore voidable. If it be void, however, it may be resisted in any court of general jurisdiction, and not merely in the court which rendered it. Although, therefore, the judgment in question was rendered in a different court from that in which this action was brought, yet if it be void, the appel-

lant may defend against it, because no subsequent proceedings can be based upon a void judgment. It is well settled that a judgment which is merely erroneous cannot be assailed collaterally. If the court has jurisdiction of the person and the subject-matter, then, however irregular may be the proceeding, the judgment is merely erroneous, and is binding until reversed or vacated in the manner provided by law. This is what the cases decide which are cited by counsel for the appellee.

It is equally well settled that a void judgment will not support further proceedings; so the question is at last, Is this judgment void, or merely erroneous?

Generally, a *feme covert* has no personality in law. She is not recognized by it, save in a few excepted cases, so that a personal judgment can be taken against her. The contracts of an infant are, in general, voidable only, while those of a married woman are void. True, she may, under certain circumstances, bind her separate estate, but not herself personally, the reason being that she has no personal identity in law. It does not follow, because, as an exceptional case, a personal judgment may go against her for her tort, or upon a contract made by her when single, the reason being, that her *status* at the making of it is regarded as following it to its completion, that therefore all personal judgments against her are merely erroneous, and not void. If she has no legal *status* in court, certainly it should have no jurisdiction to render a judgment binding her personally. Her existence is merged in that of the husband, and she can make no contract binding herself personally, or subjecting her to a judgment *in personam*. Her contract is void in law. In equity it may be enforced against her separate estate if she so intended; but she incurs no personal liability by it, because she has, legally speaking, no personal existence, and it must be satisfied out of her estate by proceedings *in rem*. She is by law incapacitated from retaining an attorney, and no personal liability arises, because she has no legal existence. There is, therefore, so far as she is concerned, no person within the court's jurisdiction. If a personal judgment be rendered upon a claim, the alleged liability is merely placed upon an advanced footing; and if originally it was void as to her, then the unauthorized judgment should not estop her from resisting it, from the fact that she was not *sui juris*, and had no such legal existence as authorized a personal judgment.

We are aware there is a conflict of authority in this country upon this question, but the views above advanced seem to us not only supported by reason, but we know they are sustained by such high authority as the supreme courts of Pennsylvania, Missouri, and other states. In this case the rights of no innocent or third parties have intervened. The present action is between those who were parties to the unauthorized judgment, and its entry, inasmuch as the claim upon which it was founded was void as to her, and she could have no voice or control of the suit, should not prejudice her. Her helplessness must protect her. As to her, the judgment was void.

In the case of *Green v. Page*, 80 Ky. 368, notes were given by a husband and wife for an interest in a hotel building. In an action by the assignees against the assignors, it was claimed that the failure to take a personal judgment upon the notes against the wife absolved the assignors from liability; but this court said that such a judgment would have been a nullity. The views of this court, as given in the opinion upon the former appeal of this case (and as now again stated), have since been followed in the case of *Stevens v. Deering*, 10 Ky. Law Rep. 393. It is averred in the reply, and not denied, that in the action in which the judgment now sought to be enforced was rendered, the appellant and her husband availed themselves of all defenses, both legal and equitable. This is a sort of legal conclusion of the pleader. It is not averred that she, in that action, set up her coverture, and that the court then decided whether such was her *status*, and passed upon the question, nor does this otherwise appear.

The original appeal is sustained, and judgment below reversed, with directions to dismiss the action.

This disposes of the cross-appeal, and it is dismissed.

MARRIED WOMEN — JUDGMENTS AGAINST — VALIDITY OF: See extended note to *Caldwell v. Walters*, 55 Am. Dec. 599-602. A married woman is liable for the price of clothing for a minor child, where she bought it and ordered it charged to her: *Meads v. Martin*, 84 Mich. 306. A married woman is responsible for the price of articles purchased for use on her separate estate: *Brown v. Thomson*, 27 S. C. 500.

CASES
IN THE
SUPREME COURT
OF
MARYLAND.

BALLOOK v. STATE.

[73 MARYLAND, 1.]

LOTTERY — AUSTRIAN GOVERNMENT BOND. — The sale of an Austrian government bond, under which the purchaser receives in any event the face value thereof, with interest up to the time of a drawing, and a premium prize of twenty per cent, with a chance to draw a higher prize from numbers drawn from a wheel at stated times, is the sale of a chance in a lottery, within the meaning of a statute prohibiting the sale of “anything” which, on the happening of an event or contingency in the nature of a lottery, entitles the holder to money or property.

LOTTERY — WHAT IS. — Any device whereby money or any other thing is to be paid or delivered on the happening of any event or contingency in the nature of a lottery is a lottery.

LOTTERY — FOREIGN GOVERNMENT BOND — RIGHT OF STATE TO PROHIBIT SALE OF. — When a foreign government bond is coupled with conditions and stipulations which change its character from a simple bond for the payment of money of a specified amount to a species of lottery ticket, a state statute prohibiting the sale thereof does not violate treaty stipulations nor constitutional provisions.

LOTTERY LAWS — EFFECT OF, ON NON-RESIDENTS. — A statute prohibiting the sale of lottery tickets within the state operates equally and alike upon resident and non-resident foreigners, and as to the latter, it does not violate treaty or constitutional provisions.

Peter J. Campbell and William S. Bryan, Jr., for the appellant.

William Pinkney Whyte, attorney-general, for the appellee.

IRVING, J. Section 172 of article 27 of the code of Public General Laws of this state is in these words: “No person shall draw any lottery or sell any lottery ticket in this state; nor shall any person sell what are called policies, certificates,

or anything by which the vendor or other person promises or guarantees that any particular number, character, ticket, or certificate shall, in any event, or on the happening of any contingency, entitle the purchaser or holder to receive money, property, or evidences of debt." Section 173 of the same article provides that "all devices and contrivances designed to evade the provisions of the preceding section shall be deemed offenses against it." Section 176 makes provision for punishing any one who may keep "a house, office, or other place for the purpose of selling or bartering any lottery ticket, policy, certificate, or any other thing by which the vendor or other person promises or guarantees that any particular number, character, ticket, or certificate shall in any event, or on the happening of any contingency in the nature of a lottery, entitle the purchaser or holder to receive money, property, or evidence of debt." The next section punishes the owner of any house for permitting it to be used as a place for selling lottery tickets, or any of the things in the nature thereof mentioned in the preceding section.

The appellant was indicted in the criminal court of Baltimore for violating these lottery laws of the state. The first count charges the appellant with selling to Bernard C. Winckler "a lottery ticket." The second count charges the sale of "a lottery policy." The third charges the sale of "a lottery certificate." The fourth count charges him with selling "a certain thing by which the vendor thereof promised that a particular number should, on the happening of a contingency in the nature of a lottery, entitle the holder of said thing to receive money, contrary to the form of the act of assembly in such case made and provided," etc. Other counts charged him with keeping "a room," "a place," "a house," for the sale of such things, and for permitting such room, place, or house to be kept for such purpose.

No question arises upon the form or sufficiency of the indictment. The appeal presents but a single question, whether certain evidence was properly admitted by the trial court in support of any of these charges against the appellant.

The case was tried before the court without the aid of a jury, and the only exception in the case is to the admission of the testimony set out in the exception, which was objected to *en masse*. The witness testified that the appellant sold to him for the sum of ninety-five dollars an instrument called an "Austrian Government Bond," which provides that the Aus-

trian government will pay to its bearer the principal sum of one hundred gulden, Austrian value, in accordance with its condition set forth on the back of the instrument, together with one fifth part of any such sum of money as may be allotted to the prize number of the bond, and which sum must amount to at least one hundred and twenty gulden, Austrian value, with interest semi-annually on the bond until the same is drawn, at the rate of five per cent per annum; and by the rules and regulations concerning the drawing and redemption of these bonds indorsed on the instrument in question it is, in substance, provided that the bonds issued on the loan of March 15, 1860, are divided into twenty thousand equal series, and each series, to the amount of ten thousand gulden, is subdivided into twenty numbers, marked from 1 to 20. Each of the bonds contains on its left heading the number of the series, and on its right its prize number; the drawing of the series numbers, it is provided, shall take place on the first day of February and August in each year; that of the prize number on the first day of May and the second day of November in each year. For the purpose of the drawing of the series, twenty thousand numbers are deposited in a wheel, from which the fixed number of series to be redeemed for the half-year is drawn.

The series numbers so drawn are then deposited in a second wheel to await the next drawing of prize numbers. On the day when the drawing of prize numbers takes place, twenty numbers, from 1 to 20, are deposited in a separate wheel, whereupon the wheel wherein the series numbers are deposited is unlocked, and one number drawn therefrom. This number designates the series of the bond which is entitled to the highest prize. Thereupon a number from the wheel containing the twenty prize numbers is to be drawn, and this number designates the bond which is entitled to the highest prize. In this manner the drawings are to be continued until all the prizes above six hundred gulden are exhausted. All other bonds receive the principal and interest, and twenty per cent in addition.

At every drawing the following prizes are drawn: First, one of three hundred thousand gulden, one of fifty thousand gulden, one of twenty-five thousand gulden, two of ten thousand gulden, fifteen of five thousand gulden, and thirty of one thousand gulden. Drawn bonds are to be paid three months after the drawing. The holder of a bond receives in any

event the face value thereof, with interest at five per cent up to the drawing, and a premium prize of twenty per cent. He has also the chance to draw one of the higher prizes. The chance varied from sixty thousand to two hundred gulden. This statement of the offer is in the bill of exception, and the translated bond furnished the court does not materially vary the statement.

Our statute allows the sale of nothing which, on the happening of a contingency "in the nature of a lottery," brings pecuniary benefit which would not be enjoyed but for the chance falling to the holder. Courts are required by section 184 to construe the provisions liberally, in order to reach and suppress the evil; and they are required to hold "anything" to be a lottery ticket which, on the happening of such event or contingency in the nature of a lottery, entitles the holder to money or property. In *Smith v. State*, 68 Md. 170, this court decided that it was the duty of the courts to hold any device whereby money or any other thing is to be paid or delivered on the happening of any event or contingency in the nature of a lottery to be a lottery ticket. The same view is reiterated in *Boylard v. State*, 69 Md. 512. Every possible phase of such transaction seems to have been provided against in our statute. Section 183 of article 27 of the code provides that these sections relating to lotteries shall apply to all lotteries, "whether authorized by any other state, district, or territory, or by any foreign country." This provision effectually disposes of the contention that the word "person," in the statute, does not include a sovereign state or country. The statute provides that it shall.

Webster defines a lottery to be "a distribution of prizes by lot or chance"; and Worcester says "it is a distribution of prizes and blanks by chance," "a game in which small sums are ventured for the chance of obtaining a larger value." It has been strenuously and ably contended that because there are no blanks in the wheel, but something of value must always come to the holder of any particular number, it is no lottery ticket. Such does not seem to be the legal acceptance, and under our law it certainly cannot be. In *Hull v. Ruggles*, 56 N. Y. 424, it is said: "Where pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to receive for it, that is a lottery. Something very inconsiderable could be substituted for the

blank, if the defendant's argument was sound, and this would entirely destroy its character as a lottery. Its vicious character would be entirely purged by such substitution. Our statute certainly prohibits such evasion, and prevents a ruling which would sanction such evasion, or make it possible. The law of this state, for the purpose of preventing the mischiefs lotteries are thought to produce, makes anything partaking of the nature of a lottery a lottery. It has been vigorously argued that, because the money ventured must all come back, with interest, so that there can be no final loss, it cannot be a lottery, even within the meaning of our law. At some uncertain period determined by the revolution of a wheel of fortune, the purchaser of a bond does get his money repaid; but we do not think this deprives the thing of its evil tendency, or robs it of its lottery semblance and features. The inducement for investing in such bonds is offered of getting some "bonus," large or small, in the future, soon or late, according to the chances of the wheel's disclosures. The investment may run one year or it may run thirty years, according to the decision of the wheel. It cannot be said this is not a species of gambling, and that it does not tend in any degree to promote a gambling spirit and a love of making gain through the chance of dice, cards, wheel, or other method of settling a contingency. It certainly cannot be said that it is not in "the nature of a lottery," and that it has no tendency to create desire for other and more pernicious modes of gaming. Our statute does not justify a court, expressly directed to so construe the law as to prevent every possible evasion, whether designedly or accidentally adopted, in deciding a thing is not a lottery, simply because there can be no loss, when there may be very large contingent gains, or because it lacks some element of a lottery according to some particular dictionary's definition of one, when it has all the other elements, with all the pernicious tendencies which the state is seeking to prevent. Striking at the root of the evil, and to prevent all its possible mischiefs, the statute lays down a different rule from that applied to the construction of other criminal statutes, which is a rule of strict construction. Instead of that rule, the law says this statute is to be construed liberally, in order to prevent the introduction and use of anything in the nature of a lottery for the making of money or securing property. The case of *Kohn v. Koehler*, 96 N. Y. 362, 48 Am. Rep. 628, was a civil suit, un-

der the New York statute, to recover double the amount paid by plaintiff for a bond exactly like the one here involved, and does decide that it did not fall under the condemnation of the New York statute, and the case of *Ex parte Shobert*, 70 Cal. 632, 59 Am. Rep. 432, follows it in construing the California statute. We have examined the statutes of those states, and do not think those cases can or ought to control us in the construction of our statute, which is so essentially different from both the New York and the California law. Even upon the New York statute, we think the reasoning of Judge Davis in the supreme court in *Kohn v. Koehler*, 21 Hun, 466-470, more convincing and sounder than that of the appellate court, which reversed the supreme court's decision in the case, and we approve the reasoning of the supreme court.

Our state has such a well-defined policy respecting lotteries, and regards them, or anything in the nature of them, so detrimental to public and private morals, and so much in the way of the certain and substantial thrift of its citizens, that it has forbidden the dealing in anything partaking of their nature. It has expressly included, as we have already noted, anything of that nature authorized by other states and foreign governments. Its dignity and laws, therefore, ought to be upheld, unless the law be plainly violative of constitutional obligation or treaty stipulation. We cannot see that our law is so. It is true that Austrian government bonds are vendible, and ought to be treated as other articles of commerce, as a rule; but when those bonds are coupled with conditions and stipulations which change their character from simple government bonds for the payment of a certain sum of money to a species of lottery ticket which falls under the condemnation of our statutes, it must be classed as its conditions characterize it, and then it is not vendible under our law, and it does not violate constitutional provision or treaty stipulation to so hold. All the decisions of the supreme court make a saving in favor of police regulations as within constitutional authority. Such bonds as this should be no more protected in their sale than diseased meat or diseased cattle, which no one would contend could not and should not be restricted and punished. They are property, of course, and their possession would be protected, and if disturbed, the law would redress. So it would be with Louisiana lottery tickets, which are confessedly not salable; and such bonds should be no more protected in sale than the lottery tickets pure and simple.

The case has been argued as if this defendant was charged to be and is an Austrian subject, and entitled by treaty stipulation to sell and dispose of his property. He is not so charged to be, and if he was, he would have to be treated exactly as if he was a citizen of the United States and the state of Maryland. The criminal laws operate alike and equally upon residents and non-residents. As an Austrian, he could not sell lottery tickets in the Louisiana lottery, although he might own them, with any more immunity and right than one of our own citizens. Constitutional provisions and treaty stipulations never could have been intended to prevent a state from forbidding that which was deemed injurious to its people. We think the evidence excepted to was properly admitted. The ruling will be affirmed.

Ruling affirmed, and cause remanded.

LOTTERY — WHAT CONSTITUTES. — A scheme by which a company sells tickets for a certain sum of money, which entitle the purchaser to select certain numbers which, if drawn from a revolving wheel, entitle the purchasers to a much larger sum of money than the price of the tickets, is a lottery: *State v. Kansas etc. Ass'n*, 45 Kan. 351; 23 Am. St. Rep. 727, and note. See *Yellowstone Kit v. State*, 88 Ala. 196; 16 Am. St. Rep. 38, and extended note. Disposing of a horse by selling chances to shake dice for it is a lottery: *Commonwealth v. Brockway*, 150 Mass. 322.

LOTTERY — FOREIGN BONDS. — For a discussion of whether the issuance of foreign bonds the year in which the same are to be payable, to be determined by an annual drawing by lot, constitutes a lottery, see the cases of *Ex parte Shobert*, 70 Cal. 632; 59 Am. Rep. 432; *Kohn v. Koehler*, 96 N. Y. 362; 48 Am. Rep. 623.

HARRIS v. MAYOR AND CITY COUNCIL OF BALTIMORE.

[78 MARYLAND, 22.]

PARTNERSHIP — IMPLIED POWER OF PARTNER TO BIND FIRM. — A partnership formed for taking and executing paving and curb contracts in a city is not a commercial partnership, and the individual members thereof have no implied authority to borrow money and make notes therefor to bind the firm, in the absence of proof showing actual necessity or usage for the exercise of such power in conducting the business.

Albert Ritchie, for the appellant.

Bernard Carter and William A. Hammond, city solicitors, for the appellee.

ALVEY, C. J. This case has been reargued, and upon reconsideration the majority of the court are decidedly of opin-

ion that the judgment of the court below ought to be reversed, instead of being affirmed, as was done upon the first argument.

The action was brought by the plaintiff, the present appellant, as assignee of William R. Weaver and Charles H. Harris, contractors for and doing the work of paving and curbing of streets in the city of Baltimore, in the partnership name of William R. Weaver and Company, against the mayor and city council of Baltimore, to recover a balance of nine thousand dollars, alleged to be due the assignors on contracts executed by them, and which was by said contractors assigned to the plaintiff. The city occupies the position of a mere stake-holder, and defends for the National Farmers' and Planters' Bank of Baltimore, that bank claiming and having received the fund under a prior assignment to that made to the plaintiff, — the bank having indemnified the city against the result of this suit.

The plaintiff was defeated in his right to recover, upon the application of the general principle in the law of partnership that applies in cases of trading or commercial partnerships, but not in cases of non-trading partnerships. Hence, Weaver, as partner, was held by the court to be general agent of the firm, with power, by implication, to act for and bind the firm in all matters as fully as a trading partner could do, including the power to borrow money, to make and pass promissory notes, and to pledge the assets of the partnership as collateral security for money borrowed, even though it was without the knowledge of his copartner, and the money was in fact applied to his own use. This is the principle of the instruction given by the court to the jury at the instance of the defendant, and it is also the principle of the ruling of the court on the proffer of evidence by the plaintiff, as set out in the second bill of exception. In both of these rulings we think there was error.

The partnership here is not claimed or asserted to be a trading or commercial partnership in any proper sense of the term; nor is there any the least pretense to assert that there was any express authority from the copartner Harris to Weaver to borrow the money of the bank, and to make and pass the promissory notes of the firm payable to the bank or order, and at the same time to pledge by assignment the assets of the firm as collateral security for the money thus borrowed; nor is there any pretense to say that those acts of Weaver were ever ratified by Harris. But the defendant re-

lies alone upon an implied authority, supposed to result from the relation of the partner, and what is asserted to be the necessity of the business. There was no proof, however, of the manner of conducting the business, nor as to any necessity for the exercise of power to borrow money to carry it on, nor as to any custom or usage in the manner of raising funds for the due prosecution of the work under contracts, such as those made and performed by this firm. No such question was put to the jury; but the court simply assumed as matter of law that there was, in such cases, an actual necessity for the exercise of the power to borrow money to enable the firm to perform the contracts, and therefore there was authority, by implication, in each of the partners to borrow money, make notes, and pledge the property of the partnership as collateral security, in the name and on account of the firm. This we do not understand to be the law in regard to partnerships of the character of the one in question. The text-writers of the highest authority, as do also many decided cases, maintain a doctrine directly the reverse.

In Story on Partnership, sec. 102 a, the learned author, after stating the general principle applicable to trading or commercial partnerships, goes on to say that "we are to understand that this doctrine is not applicable to all kinds of partnerships, but is generally limited to partnerships in trade and commerce, for in such cases it is the usual course of mercantile transactions, and grows out of the general custom and laws of merchants, which is a part of the common law, and is recognized as such. But the same reason does not apply, or at least may not apply, to other partnerships, unless indeed it is the common custom or usage of such business to bind the firm by negotiable instruments, or it is necessary for the due transaction thereof."

And so in 1 Lindley on Partnership, Ewell's ed., sec. 130, it is laid down as the settled law that "one partner in a non-trading partnership cannot bind his copartner by a bill or note drawn, accepted, or indorsed by him in the firm name, even though it be for a debt of the firm, unless either he has express authority therefor from his copartner, or the giving of such instruments is necessary to the carrying on of the partnership business, or is usual in similar partnerships; and the burden is upon the party suing on such note or bill to prove such authority, necessity, or usage." See note 1, and cases there cited, on same page.

There are other text-writers of high authority, to whom reference could be made, who have been equally explicit in noting the distinction between the powers of a partner in a trading or commercial partnership, and the powers of a partner in a non-trading partnership; but it is unnecessary to cite them.

The qualification of the general principle thus stated by the text-writers is fully supported by the decisions, as will appear by an examination of the cases of *Dickinson v. Valpy*, 10 Barn. & C. 128; *Brown v. Byers*, 16 Mees. & W. 252; *Brettel v. Williams*, 4 Ex. 623; *Smith v. Sloan*, 37 Wis. 285; 19 Am. Rep. 757; *Davis v. Richardson*, 45 Miss. 499; 7 Am. Rep. 732; *Pease v. Cole*, 53 Conn. 53; 55 Am. Rep. 53; and many other cases, some of which are referred to in the brief of the counsel for the plaintiff.

In the leading case of *Dickinson v. Valpy*, 10 Barn. & C. 128, a copartnership formed to purchase and operate mines, and where the question was, whether the copartners were liable on an instrument drawn by a member in the name of the company, and in the form of a bill of exchange, but which the court held to be in effect a promissory note, it was held to be incumbent on the plaintiff to prove that a member of the company had authority to bind other members by the making of such an instrument; and the plaintiff having failed to give evidence to show that it was necessary, for the purpose of carrying on the business of that mining company, or usual for other mining companies to draw or accept bills of exchange, or make promissory notes, the plaintiff was not allowed to recover. And Mr. Justice Littledale, concurring with the rest of the court, in the course of his opinion said: "Evidence of the nature of the company ought to have been given, to show that, in order to carry into effect the purposes for which it was instituted, it was necessary that individual members should have the power of binding the others by drawing and accepting bills of exchange. In the absence of any such evidence, I am of opinion that it is not competent to individual members of a mining company (which is not a regular trading company) to bind the rest by drawing or accepting bills." And in the case of *Brettel v. Williams*, 4 Ex. 623, where persons were partners as railway contractors, and had contracted to do certain works, and there was a subcontract for the doing of part of the work, for the doing of which coals were required to make brick, it was held that

one of the partners had no authority to guarantee, in the name of the firm, payment for coals to be furnished to those with whom the firm had contracted for making the bricks; there being no evidence that the guaranty was necessary for carrying into effect the contract of the firm. In that case Mr. Baron Parke, in the course of a carefully considered opinion for the whole court, after referring to some previous cases, said: "In the present case, no evidence was given to show the usage of the defendants in this particular business, or of others in a similar business; nor was there any evidence of the sanction by the other defendants of the act of their co-partner; for a witness, who was called to prove the latter fact, would not, on cross-examination, swear that he was authorized by them to write a letter which, if proved to have been so written, would have been sufficient. Simply as railway contractors, they could not have any such power." And it would therefore seem to be very clear, that if partnerships formed for operating mines, to construct railways, and, as shown by the cases, for farming, for hotel-keeping, for conducting theaters, and the like, are not to be regarded as in the class of trading or commercial partnerships, for the same reason partnerships formed for taking and executing paving and curbing contracts are not *per se* in such class; and therefore there is no implied authority in the members to borrow money and make promissory notes therefor to bind the firm, unless there be proof to show the actual necessity or usage for the exercise of such power by the individual members of the firm in conducting the work. See case of *Kimbrow v. Bullitt*, 22 How. 256.

The bank had knowledge of the nature of the partnership; that was disclosed on the face of the transactions by which the money was obtained by Weaver. And with that knowledge it was its duty to inquire as to the authority of Weaver to make the notes and assignments; and failing to make such inquiry, it took the notes and collateral security at its peril: *Cocke v. Branch Bank at Mobile*, 3 Ala. 175; *Judge v. Braswell*, 13 Bush, 67; *Pooley v. Whitmore*, 10 Heisk. 629; 27 Am. Rep. 733; *Benedict v. Thompson*, 33 La. Ann. 196.

The notes constitute the primary claim of the bank, and the assignments are only collateral and subsidiary to the principal debt. If the notes were made without authority, and not therefore binding on the firm, the assignments, which by express terms are only intended as collateral security for

the notes, would, upon the authorities, equally fail to bind the firm. But the assignments would be good and effective to bind and transfer any interest of Weaver in the claims against the city, after payment of partnership debts and liabilities, but to that extent only. It would appear, however, that there is no such interest upon which the assignments can operate.

In our opinion, the court below should have ruled in the testimony offered by the plaintiff in the second exception, and should have rejected the prayer of the defendant, and granted the first and fourth prayers of the plaintiff, and therefore the judgment ought to be reversed.

Judgment reversed, and new trial awarded.

BRYAN, J., who prepared the opinion delivered upon the first argument of this case, dissented from the opinion adopted by the majority of the court upon the reargument, and gave it as his opinion that the firm in question must be regarded as belonging to the class of trading or commercial partnerships in which there is implied authority in an individual member to bind the firm by borrowing money or making promissory notes, or to pledge its assets as collateral security for money borrowed, without proof of such power expressly granted, or of an actual necessity for its exercise, or of a usage authorizing it. In arriving at this conclusion, Judge Bryan stated his reasons, in effect, as follows: In the absence of express agreement, the principles which determine the powers of partners are the same in all partnerships. In this respect there is no line of demarkation between trading and non-trading partnerships. In either case they may do whatever is within the contemplation of the contract of partnership, and necessary for the transaction of its business in the way in which that business is ordinarily carried on by other people; and in determining the powers of the individual partners the inquiry must always be directed to this point. While the power of a partner to bind the firm by negotiable instruments is generally limited to partnerships in trade and commerce, because they have the most frequent occasion to borrow money to carry on their business, still there is no reason why it should not extend to partnerships of other descriptions which require the same facilities: *Lindley on Partnership*, 124-132; *Dickinson v. Valpy*, 10 Barn. & C. 140; *Hoskinson v. Elliot*, 62 Pa. St. 393, 401, where it was said: "In all contracts concerning negotiable paper, the act of one partner binds all; and there is no distinction in principle upon this point between general and special partnerships. One partner may borrow money for the partnership, and give notes and other negotiable securities therefor in the name of the firm; and the partnership is liable for money borrowed by one of its members on the credit of the firm, within the general scope of its authority and according to the usual course of its business. But while it is conceded that this is the law as applicable to commercial partnerships, it is insisted that it does not apply to partnerships formed for mechanical or manufacturing purposes. But no such distinction is suggested or recognized in any of the adjudicated cases or text-books; and there is no foundation for it in the necessities or usages of these partnerships. The necessity for borrowing money to carry on the business of a manufacturing partnership may be

as great as it is in order to carry on the business of one that is strictly commercial; and common observation and experience show that it is equally the custom and usage of manufacturing as of commercial partnerships to borrow money to enable them to conduct their business." The distinction between the power of partners in trade and partners in paving and grading streets, as in the present case, is very attenuated and unsubstantial, especially when, as here, they describe themselves as a trading partnership, and in view of the fact that "the business of paving and grading streets is as well recognized as any other conducted in the city of Baltimore. It is of great extent; it is estimated there are within the city five hundred miles of paved streets, and the number is constantly increasing, and they are continually needing repairs. As I endeavored to show in my former opinion, this business requires unceasing expenditure of money. The court cannot shut its eyes to the established course of business in large commercial cities."

PARTNERSHIP — IMPLIED POWER OF PARTNER TO BIND FIRM BY NOTE IN ITS NAME. — One partner can bind his copartners by a note in the name of the firm in those partnerships only that are engaged in a trade or concern in which the issue or transfer of bills is necessary or usual; *Lanier v. McCabe*, 2 Fla. 32; 48 Am. Dec. 173; *Andrews v. Planters' Bank*, 7 Smedes & M. 192; 45 Am. Dec. 300, and note. See extended note to *New York etc. Ins. Co. v. Bennett*, 13 Am. Dec. 115; *National etc. Bank v. Noyes*, 62 N. H. 35; *Randall v. Merideth*, 76 Tex. 669; *O'Bryan v. Neel*, 84 Ga. 134; *Lee v. First Nat. Bank*, 45 Kan. 8. One partner cannot bind the firm by acts done outside of the scope of the business: *Nolan County v. Simpson*, 74 Tex. 218.

CUMBERLAND AND PENNSYLVANIA RAILROAD COMPANY v. STATE.

[73 MARYLAND, 74.]

RAILROADS — NEGLIGENCE, WHEN QUESTION OF LAW. — In an action against a railroad company to recover for a personal injury resulting in the death of a trespassing boy, seven years of age, by being run over by a train, the company should be declared not liable, as matter of law, notwithstanding its admitted negligence, in the absence of proof connecting the injury therewith, and showing that it was the direct consequence of such negligence. In such case it is reversible error to refuse to take the case from the jury and so declare the law.

Robert H. Gordon and Henry Kyd Douglas, for the appellant.

Ferdinand Williams, for the appellee.

IRVING, J. The equitable plaintiff, the appellee in this court, sued the appellant for killing her son, a boy of seven years old, through the negligence of its employees in running the train which inflicted the injuries.

Appellant's engine No. 4 was coming east, into the city of Cumberland, drawing a train of five or six freight-cars, including one box-car. The tender was in front of the engine,

which was running backward, pulling the train. According to the plaintiff's witnesses, the tender was square, five feet high from the truck, without any lookout upon it, and was some obstruction to the fireman and engineer in seeing the track in front of it. An ordinance of the city of Cumberland prohibited trains passing through the city going faster than six miles per hour. Plaintiff's witnesses testified that this train was running at a speed of from seven to nine miles per hour, which was a violation of the ordinance.

The rules of the railroad company required the whistle to be sounded for stations and crossings; and after the whistle had sounded, the bell was required to be rung until the station or crossings were passed; and the bell is to be sounded continually while passing through the limits of incorporated cities; but the use of the whistle when in close proximity to streets or roads where houses are used was, by the rules of the company, to be avoided as much as possible. Evidence was offered by the appellee tending to prove a violation of the rules of the company in omitting to sound the whistle and ring the bell.

There were two tracks, one for the east-bound train, and one for the west-bound train; and when engine No. 4 was coming east between Valley Street and Knox Street, another train came down on the other track, going westward at the rate of twenty or twenty-five miles an hour. Engine No. 4 had passed the point where the accident occurred, when a witness of the plaintiff saw the train going westward stop, and saw the brakeman go back and pick up a boy from the track over which engine No. 4 had passed, and carry him to the watch-box, where the witness joined "the party." The boy was found lying with his body outside the east-bound track, and his shoe and foot, which was cut off, were inside the rail which was farthest from the west-bound track. The witness heard somebody scream shortly after the engine No. 4 and train had passed. He was alive when found, but died during the night of the same day. He was found between two streets, but near no crossing.

At or near the spot where he was killed, there was a coal-yard, to which the mother of the boy testified she had sent him in the afternoon to order some coal. She testified that in going and returning from the coal-yard, it was not necessary to cross the track or go upon it. The plaintiff's witnesses had not seen the boy till he was picked up after the injury.

One foot was cut off, and the other was badly crushed, and no other injuries are mentioned as sustained.

The appellee rested its case, and the appellant, before offering any testimony on its part, offered a prayer, "that there is no evidence in this case from which the jury can find that the death of John F. Millslagle was caused by the negligence of the defendant's employees, and under the pleadings and evidence in the case the plaintiff is not entitled to recover." This instruction was refused, and is the subject of the first exception.

The court having refused, at this point, to take the case from the jury, the appellant offered evidence tending to show that the train was not going at a speed beyond the six miles allowed by the city ordinance, and that the bell was rung and whistle was blown; and that there was no one on the track in front of the tender and engine, and no one near it; and that witnesses were looking and could see. A witness also testified that she saw the boy fifteen minutes before the accident attempting to get on a freight train moving westward. He was taking hold of the box-car next to the tender. She was very near him. She next saw him when he was being taken home, after the accident. When the case was closed, various instructions were asked by plaintiff and given, to which defendant excepted. Several prayers on the part of the defendant were granted, but the prayer, which was again offered, asking that the case be taken from the jury, was rejected, and is included in the second exception.

The only question raised and relied on in this court is on the refusal of the court to instruct the jury that there was no legally sufficient evidence to justify a verdict for the plaintiff.

We are all of opinion that the court erred in refusing to take the case from the jury, because, conceding there was negligence on the part of the appellant's employees, still there is not the slightest proof connecting the injury with that negligence, and showing that the injury sustained was the direct consequence of such neglect of duty. In *State v. Baltimore etc. R. R. Co.*, 58 Md. 484, this court said it was incumbent on the plaintiff so to show. It may be assumed that the cars were going at a rate of speed forbidden by the ordinance of the city, and that the rules of the company were violated in respect to signals of approach; yet it must appear, as was said in *Philadelphia etc. R. R. Co. v. Stebbing*, 62 Md. 517, that "the negligent breach of the duty imposed by the ordinance

was the direct and proximate cause of the injury complained of, and that such injury would not have occurred but for the violation of that duty." There is no proof in the cause from which it can reasonably be inferred that the negligence in any of the recited particulars was the cause of the boy's injury. The plaintiff's own proof shows that the boy had no occasion to go on the track of the appellant in executing the errand upon which his mother sent him. There was no crossing at the point of the accident. He was therefore a trespasser, and wrongfully on appellant's roadway. It would seem, therefore, as was said in *Baltimore etc. R. R. Co. v. State*, 62 Md. 488, 50 Am. Rep. 233, "to be necessary to show some negligence, amounting to the omission of a general and imperative duty toward him, to subject the defendant to liability in the action brought." If the boy had been shown to have been on the track, and the defendant negligently omitted to warn him of his danger, and was, while he was so on the track, violating an ordinance of the city in the speed of its cars, or violating rules of the company, then the injury might have been referred to this negligence; but there is no proof that he was on the track, and that the defendant's operatives ought to have seen him. How he came where he was when he was picked up is a mere matter of speculation and surmise, and this court has said, in *Baltimore etc. R. R. Co. v. State*, 71 Md. 599: "In matters of proof, we are not justified in inferring from mere possibilities the existence of facts; there must be proof of the essential facts to fix liability upon a party charged with the commission of a wrongful act." A jury may not be permitted merely to conjecture how the accident occurred. He is not shown to have been on the track, where, if he had been seen, as already said, although a trespasser, he would have been entitled to reasonable effort on the part of the employees of the appellant to prevent his being injured. He was not seen by the operatives, nor was he seen on the track by any one else, so as to impute negligence to the employees for not seeing him. We can, therefore, see no duty to the boy which was omitted, and the omission of which can be said to have occasioned his injury and death. From the posture of the boy when found, and the character of his injuries, no reasonable inference could be made that he was on the track and was knocked off. The head, body, and arms gave no indication of having been struck by the tender or any part of the train. The only injury was the cutting off

one foot and the crushing of the other. If guessing were admissible, his posture and injuries would more reasonably suggest that in an effort to get on the box-car while the cars were in motion he lost his hold and footing, and slipped his legs under the wheels. But speculation may not be indulged, and in the absence of proof connecting the accident in some way with appellant's negligence, the suit must fail. The question of contributory negligence not being really involved, we have not found it necessary to consider or pass upon any of the questions arising out of the boy's age, and the authorities cited on that subject. If there be any difference in respect to the duty of a railroad toward a boy of seven and an adult person, enough has not been shown in this case to make it necessary to consider the distinction which some authorities say exists. In addition to the authorities already cited, we refer to *State v. Philadelphia etc. R. R. Co.*, 60 Md. 555; *Northern Central R'y Co. v. State*, 54 Md. 113; *Baltimore etc. R. R. Co. v. State*, 54 Md. 655; *State v. Philadelphia etc. R. R. Co.*, 47 Md. 76; *Baltimore etc. R. R. Co. v. Schwindling*, 101 Pa. St. 261; 47 Am. Rep. 706. As the case ought to have been taken from the jury, the judgment must be reversed without awarding a new trial.

Judgment reversed.

NEGLIGENCE — WHEN A QUESTION OF LAW. — Negligence must be shown to be the cause of the injury: *Robinson v. Flint etc. R. R. Co.*, 79 Mich. 323; 19 Am. St. Rep. 174; *Childrey v. Huntington*, 34 W. Va. 457. The burden of proof is upon him who alleges negligence to show that such negligence was the cause of the injury: *Brownfield v. Hughes*, 128 Pa. St. 194; 15 Am. St. Rep. 667, and note. On the question of negligence, when to be determined by the court, see extended note to *Tolman v. Syracuse R. R. Co.*, 50 Am. Rep. 653-656; note to *Snow v. Housatonic R. R. Co.*, 85 Am. Dec. 730; *Franklin v. Harter*, 127 Ind. 446.

FRESH v. CUTTER.

[73 MARYLAND, 57.]

SLANDER. — MALICE IS THE FOUNDATION of the action of slander, and is ordinarily implied; but there may be justification from the occasion, and when this appears, the words must be proved to be malicious as well as false.

SLANDER. — JUSTIFICATION FROM OCCASION, in actions for slander, arises when an actionable communication is made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, legal, moral, or social, if made to a party having a corresponding interest or duty.

SLANDER — CHARACTER OF SERVANT — PRESUMPTION — PRIVILEGED COMMUNICATION. — When a master gives a character to a servant, and is sued therefor in slander, it is presumed, in the absence of proof to the contrary, that the character was given without malice; and to support the action, it must be proved that the character was both falsely and maliciously given; and though as given it is untrue in fact, the master will be justified by the occasion, unless it is shown that he was actuated by malice, and knowingly stated what was false and injurious. In such case, the statement, if made in reponse to inquiry, is privileged, and if voluntarily made, is nevertheless privileged, if made honestly, fairly, and without malice.

SLANDER — PRIVILEGED COMMUNICATION, WHEN QUESTION OF LAW OR FACT. — In actions for slander, it is a question for the court whether or not the statement sued upon, if made in good faith and without malice, is privileged; but the plaintiff has the right, notwithstanding the privileged character of the communication, to go to the jury, if there is evidence tending to show actual malice, as when the words unreasonably impute crime, or the occasion of their utterance is such as to indicate, by its unnecessary publicity, or otherwise, a purpose wrongfully to defame the plaintiff.

SLANDER — ACTIONABLE WORDS — PRIVILEGED COMMUNICATION. — In an action for slander based on a voluntary communication made by a former master to an existing or prospective employer of the former's discharged servant, that the latter "stole as good as two hundred dollars from me, and I want my money," if the proof shows that the communication was made in good faith, under an honest belief of its truth, and a conviction of duty to disclose it, it is privileged, and not actionable; but if it was false, and was maliciously communicated, without any duty to disclose it, it is not privileged, and is actionable.

SLANDER — MEASURE OF DAMAGES — ERRONEOUS INSTRUCTIONS. — In an action for slander based on a voluntary communication claimed by the defense to be privileged, it is reversible error to instruct the jury that they may award the plaintiff punitive damages, without requiring them to find the existence of actual malice, and to consider the facts in evidence in regard to the occasion of the communication, the motive which inspired it, the honesty, good faith, and belief in its truth in uttering it.

H. H. Keedy, for the appellant.

David W. Sloan, for the appellee.

McSHERRY, J. Jacob Cutter sued George H. Fresh for defamatory words alleged to have been spoken by the latter of and concerning the former. Cutter had at one time been an employee of Fresh, but after he ceased to occupy that relation, and had entered, or was about to enter, the service of one Allen, Fresh, of his own accord, and without solicitation or inquiry on the part of Allen, said to Allen: "He [meaning the plaintiff] stole as good as two hundred dollars from me, and I want the money." These are the alleged defamatory words. It was shown by the evidence that several per-

sons had communicated information to Fresh which induced him to believe that Cutter had, while in his employment, stolen from him. It was also shown that when he learned that his neighbor Allen had employed Cutter, he, Fresh, honestly believed that it was his duty to inform Allen of what he knew concerning Cutter, and that he told Allen these things voluntarily, and without being requested, honestly believing it was a duty he owed to his neighbor, and for the sole purpose of putting Allen upon his guard. He testified that he had not been actuated by malice or ill-will, and that he had never had any bad feeling against Cutter. There was some evidence that the words complained of had been spoken by Fresh to a person named Click, though the latter was unable to state whether the language used by the defendant was "took" or "stole."

This brief outline of the facts is sufficient to indicate that the principal question which we are called upon to decide on this appeal is, whether the statement made by Fresh to Allen, under the circumstances named, was a privileged communication or not. If privileged, all the authorities agree in holding that it is not absolutely or unqualifiedly, but only conditionally, so. If falsely and maliciously made, it would be actionable. Malice is the foundation of the action, and in ordinary cases is implied from the slander; but there may be justification from the occasion, and when this appears, an exception to the general rule arises, and the words must be proved to be malicious as well as false: *Beeler v. Jackson*, 64 Md. 593. This justification from the occasion arises, in the class of cases now being considered, when a communication is "made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a party having a corresponding interest or duty," although the communication "contained criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation": *Harrison v. Bush*, 5 El. & B. 344. It seems to be generally conceded, as falling within this principle, that where a master gives a character of a servant, unless the contrary be expressly proved, it will be presumed that the character was given without malice; and the plaintiff, to support the action, must prove that the character was both falsely and maliciously given; and although the state-

ment as to the character should be untrue in fact, the master will be held justified by the occasion, unless it can be shown that in making the statement he was actuated by a malicious feeling, and knowingly stated what was untrue and injurious: *Starkie on Slander and Libel*, 253. If, under the conditions just named, the statement be made in response to an inquiry, it would undoubtedly be privileged: *Weatherston v. Hawkins*, 1 Term Rep. 110; *Child v. Affleck*, 9 Barn. & C. 403.

But in the case at bar it is conceded that the information was given by the appellant to Allen voluntarily, and not in response to any inquiry whatever, and this is supposed to take the case out of the privilege. It is not perceived why this circumstance should make any difference, if the party has acted honestly, fairly, and without malice; though when the information has been voluntarily given, this fact, it has been said, may, in some cases, have a tendency to disclose the motive of the publisher in making the publication: *Townshend on Slander and Libel*, sec. 241. Without reviewing the decided cases, it may be said that the weight of authority is to the effect that the mere fact of the communication being voluntarily made does not necessarily exclude it as a non-privileged communication; for a publication warranted by an occasion apparently beneficial and honest is not actionable, in the absence of express malice: *Starkie on Slander and Libel*, 253. Or, as stated in *Odgers on Slander and Libel*, 202, "if it were found that I wrote systematically to every one to whom the plaintiff applied for work, the jury would probably give damages against me. On the other hand, if B was an intimate friend or a relation of mine, and there was no other evidence of malice except that I volunteered the information, the occasion would still be privileged": *Rogers v. Clifton*, 3 Bos. & P. 587; *Pattison v. Jones*, 8 Barn. & C. 586. It is a question for the court, whether the statement, if made in good faith and without malice, is thus privileged. But the plaintiff has the right, notwithstanding the privileged character of the communication, to go to the jury, if there be evidence tending to show actual malice, as when the words unreasonably impute crime, or the occasion of their utterance is such as to indicate, by its unnecessary publicity or otherwise, a purpose wrongfully to defame the plaintiff: *Dale v. Harris*, 109 Mass. 196; *Brow v. Hathaway*, 13 Allen, 239; *Somervill v. Hawkins*, 10 Com. B. 583; *Gas-*

sett v. Gilbert, 6 Gray, 94. Or malice may be established by showing that the publication contained matter not relevant to the occasion: *Townshend on Slander and Libel*, sec. 245. Expressions in excess of what the occasion warrants do not *per se* take away the privilege, but such excess may be evidence of malice: *Buckley v. Kiernan*, 7 I. R. C. L. 75; *Hotchkiss v. Porter*, 30 Conn. 414.

It follows from these principles that if the communication made to Allen was made in good faith, without malice, in the honest belief of its truth, and under the conviction that it was a duty which Fresh owed to Allen to make it, the words complained of would not be actionable, because privileged, though spoken voluntarily. It is equally clear that if the words spoken were known to be false and were maliciously spoken, or were voluntarily spoken to one to whom Fresh owed no duty in the sense heretofore mentioned, the words would be actionable, because not within the privilege.

In view of these conclusions, there was error in granting the appellee's first and second instructions. Those instructions are as follows, viz.: "The plaintiff prays the court to instruct the jury that if they shall believe from the evidence that the words charged in the declaration were spoken of and concerning the plaintiff by the defendant, in the presence and hearing of other persons than the plaintiff, then the plaintiff is entitled to recover in this action." 2. "That if the jury shall find for the plaintiff, they may award such damages as they, in their judgment, shall think justified by all the circumstances of the case, not only for the purpose of giving compensation for the injury done to the plaintiff, but also for the purpose of punishing the conduct of the defendant."

The first instruction was wrong in omitting all reference to the defense of privilege. It directed the jury to find for the plaintiff if they believed the defendant spoke the words in the presence and hearing of other persons than the plaintiff. Under this instruction the jury were required to return a verdict against the defendant, even though they were satisfied that the words were spoken to Allen alone, in good faith, without malice, in the full belief of their truth, and under the honest conviction that Fresh was only discharging a social duty to his neighbor in making the communication. This entirely ignored the question of privilege, which was the only defense relied on by the appellant. The second instruction was also erroneous. It allowed punitive damages to be recov-

ered, even though the jury were not required to find the existence of actual malice on the part of the appellant. In cases of this character such is not the law. If the occasion brings the words within a qualified privilege, no damages can be recovered at all, unless the plaintiff shows that actual malice prompted the publication or utterance. The jury should have been so instructed, but they were permitted not merely to assess damages, but punitive damages, without any regard whatever to the question of malice. It is true, these instructions were taken literally from the case of *Padgett v. Sweeting*, 65 Md. 404, where they were held by this court to be correct. But that case was widely different from the one at bar. In the former there was no question of privilege. The words, as here, were actionable *per se*, but were not, as in this case it is alleged, spoken on any occasion which justified their utterance. Under the conditions in *Padgett's* case the instructions were proper. But the same instructions could not be given in a case like the one before us now, without ignoring all the circumstances admitted in evidence respecting the occasion of the publication, the motive which inspired it, the belief of the defendant in its truth, and the honesty and good faith of its utterance.

The circuit court properly rejected the appellant's first and third prayers. They were defective in several particulars. The first one omits to submit to the jury to find whether the words spoken by the appellant to Allen were the words complained of, and it forbids a recovery at all if the communication made to Allen, whatever it was, was made in good faith and without malice, even though made to others on an occasion not privileged. In effect, it told the jury if the evidence sustained the hypothesis of the prayer to find for the defendant, notwithstanding the evidence before them respecting the statements made to the witness Click. The third prayer, after submitting to the jury to find the good faith, honest belief, sense of duty, and want of malice on the part of the appellant, concluded thus: "Then the verdict of the jury on account of the said communication to said Allen must be for the defendant." The declaration alleges that the words were spoken to divers good and worthy citizens of the state. There was some evidence, as we have already stated, tending to show that Click was one of these persons; and the legal sufficiency of that evidence was not brought into question by a prayer for instructions. If the jury believed it and founded

a verdict upon it, they would have been required, had this prayer been granted, to declare specifically that they found, under this prayer, for the defendant as to the words spoken to Allen, and for the plaintiff as to the same words spoken to Click. The conclusion of the prayer was misleading, and calculated to confuse the jury. Whilst it is true that the words spoken would not be actionable under certain conditions when spoken to Allen, and would be actionable in the absence of those conditions when spoken to Click, all that the court could properly do in such a case would be to submit hypothetically to the jury the finding of facts which created the privilege in the one instance, and the opposite facts which destroyed it in the other, and to define to the jury the legal conclusions arising from those different hypotheses. A specific instruction to find for the defendant as to one of these hypotheses, without any reference whatever to the other, would have been misleading.

The appellant pleaded specially the privileged character of the communication, and the appellee demurred to the pleas. The court sustained the demurrer, and in this we think no error is to be found. The pleas were too general: *Odgers on Slander and Libel*, 644, 645.

The third prayer of the appellee merely defined the meaning of the term "malice," and was free from objection.

For the error indicated in granting the appellee's first and second prayers, the judgment must be reversed, and a new trial must be awarded.

SLANDER — MALICE — WHEN MUST BE PROVED. — Malice is not implied in cases of confidential communications, but must be proved by extrinsic evidence: *Nott v. Stoddard*, 38 Vt. 25; 88 Am. Dec. 633, and note. Malice is an essential to a cause of action for slander. It is generally implied by law, but when words are spoken under circumstances which show a good motive, and are spoken *bona fide*, malice must be shown: *Faris v. Starke*, 9 Dana, 128; 33 Am. Dec. 536; *Bradley v. Heath*, 12 Pick. 163; 22 Am. Dec. 418; *contra*, *Brueshaber v. Hertling*, 78 Wis. 498.

SLANDER — JUSTIFICATION. — A plea of justification in slander need not justify the *colloquium*. It is sufficient to justify the words which constitute the slander: *Nott v. Stoddard*, 38 Vt. 25; 88 Am. Dec. 633.

SLANDER — PRIVILEGED COMMUNICATION, WHETHER A QUESTION OF LAW OR FACT. — Whether a privileged communication is slanderous is a matter of law, see *Byams v. Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726, and note; *Jellison v. Goodwin*, 43 Me. 287; 69 Am. Dec. 62, and note; *Greenwood v. Cobbey*, 26 Neb. 449.

BOLGIANO v. GILBERT LOCK COMPANY.

[73 MARYLAND, 132.]

WITNESS — NON-RESIDENT — EXEMPTION FROM SERVICE OF PROCESS. — A resident of one state who comes into another as a witness in a cause pending there is exempt from the service of process for the commencement of a civil action against him in the latter state, and the privilege protects him in staying and returning, provided he acts *bona fide*, and without unreasonable delay.

Alfred J. Carr, for the appellant.

M. R. Walter, for the appellees.

MILLER, J. Thomas P. Bolgiano filed a bill in the circuit court of Baltimore City against the Gilbert Lock Company, and G. M. Lance, its secretary, for the specific execution of a contract, alleged to have been made by the complainant with said Lance, acting as the agent for said company. The subpoena against the defendants was duly issued, and the sheriff returned the same, "Summoned the Gilbert Lock Company by service on G. M. Lance, secretary; also summoned G. M. Lance." When this return was made, the company and Lance filed a petition to the court alleging, — 1. That the Gilbert Lock Company is a body corporate, duly incorporated under the laws of New Jersey, and doing business in that state, and is a foreign corporation, not having an office or agent in the state of Maryland; 2. That Lance is a resident of the state of New Jersey, and not a resident of the state of Maryland; 3. That Lance was present in the city of Baltimore on the 28th of March, 1890 (the day the subpoena was issued), attending as a witness the trial of a certain cause in the superior court of said city, in which the Gilbert Lock Company was plaintiff and a certain Gilbert C. Bolgiano was defendant, and that while he was in attendance as such witness, and was within the state of Maryland for that and no other purpose, the summons was served upon him as an individual, and as an officer of said company. The petitioners therefore aver that this service was illegally made upon Lance, in violation of his rights and privileges as a witness, and is null and void, and they pray for an order quashing the writ, and the return thereon. There was a demurrer to this petition, which the court overruled; and from the order overruling this demurrer this appeal is taken.

A witness is protected from arrest on any civil process while going to the place of trial, while attending there for the

purpose of the cause, and while returning home, — *Eundo, morando, et redeundo*, — and it matters not whether he attends voluntarily or by compulsion: 2 Taylor's Ev., sec. 1139; 1 Greenl. Ev., sec. 316; 1 Wharton's Ev., sec. 389. The rule stated in these terms is of almost universal application, whether the privilege be regarded as a personal one to the witness or the privilege of the court. But does it protect a witness or a party from service of a summons, in order to secure his appearance to an ordinary civil suit? On this question there has been some conflict of decision. The tendency, however, of the courts in this country is to enlarge the privilege, and afford full protection to suitors and witnesses from all forms of process of a civil nature during their attendance before any judicial tribunal, and for a reasonable time in going and returning; and we think the decided weight of authority has extended the privilege so far, at least, as to exempt a resident of another state, who comes into this state as a witness to give evidence in a cause here, from service of process for the commencement of a civil action against him in this state, and that the privilege protects him in staying and returning, provided he acts *bona fide* and without unreasonable delay. The cases bearing upon this subject have with commendable zeal and industry been collected by counsel on both sides, and appear in their respective briefs. We refer to *Person v. Grier*, 66 N. Y. 124; 23 Am. Rep. 35; *Matthews v. Tufts*, 87 N. Y. 568; *Dungan v. Miller*, 37 N. J. L. 182; *Massey v. Colville*, 45 N. J. L. 119; 46 Am. Rep. 754; *Miles v. McCullough*, 1 Binn. 77; *Huddeson v. Prizer*, 9 Phila. 65; *Wilson v. Donaldson*, 117 Ind. 356; 10 Am. St. Rep. 48; *Mitchell v. Huron Circuit Judge*, 53 Mich. 541; *Sherman v. Gundlach*, 37 Minn. 118; *First National Bank v. Ames*, 39 Minn. 179; *Palmer v. Rowan*, 21 Neb. 452; 59 Am. Rep. 844; *Rorer on Interstate Law*, 26. To the same effect are the decisions in the federal courts: *Atchison v. Morris*, 11 Fed. Rep. 582; *Small v. Montgomery*, 23 Fed. Rep. 707; *Kauffman v. Kennedy*, 25 Fed. Rep. 785. Many other cases, both in state and federal courts, to the same effect could be cited, but we deem it unnecessary. The reason for the exemption is placed by the New York court of appeals, and by Judge Cooley in the Michigan case, on the ground of public policy and the due administration of justice, and there we are content to rest it.

Order affirmed, and cause remanded.

WITNESS — EXEMPTION FROM SERVICE OF PROCESS. — A resident of another state who goes into the state of Indiana to testify as a witness in an action in which he is a party cannot be legally served with a summons at the suit of the party plaintiff in the action he goes to defend: *Wilson v. Donaldson*, 117 Ind. 356; 10 Am. St. Rep. 48, and note. One charged with an offense in another county than his residence, and is discharged, is privileged from civil suit in that county until a reasonable time to enable him to return home: *Palmer v. Rowan*, 21 Neb. 452; 59 Am. Rep. 844, and note; *Smith v. Jones*, 76 Me. 138; 49 Am. Rep. 598. See extended note to *In re Healey*, 38 Am. Rep. 717-722; *Mulhearn v. Press etc. Co.*, 53 N. J. L. 153.

STANSBURY v. HUBNER.

[73 MARYLAND, 228.]

WILLS — EFFECT OF CONDITION RESTRAINING ALIENATION. — Where land is devised to one, "and the heirs of his body, so long as they hold and till the same," the condition in the devise is void, as an attempt to restrain alienation, and the devisees take an absolute estate freed of the condition.

W. Frank Mitchell and George Yellott, for the appellant.

George Whitelock and Samuel D. Schmucker, for the appellees.

IRVING, J. This is a bill in equity, upon a case stated, to procure the specific performance of a contract for the sale of land. The purchaser refused to comply, on account of a supposed defect in the vendor's title. The appellant claims title under the will of her husband, Thomas Stansbury (the younger), who was devisee of the property now involved, under the will of Thomas Stansbury, Sen., made in November, 1816. The will of Thomas Stansbury (the younger), husband of the appellant, was made the 31st of March, 1856.

The clause of the will of Thomas Stansbury, Sen., which gives rise to this suit is as follows: "I give and bequeath unto Deborah Stansbury and Anne Powell, my daughters, all that tract of land whereon I now live, called 'Daniel's Gift,' together with 'Cuss Lot' and 'Tracy's Park,' during their natural life, and at their decease, the above three tracts of land mentioned above I will and give unto my grandson Thomas Stansbury, son of my son John, excepting the parts hereafter bequeathed to him, and the heirs of his body, so long as they hold and till the same; should he die without heirs of his body, my will and desire is, that my grandson Thomas Taylor should have it, him, his heirs, forever; and if Thomas

should die without an heir, then the aforementioned land to fall unto my grandson **James Taylor**, to him, his heirs and assigns forever."

The question in the case arises on the construction and effect of the words "so long as they hold and till the same," which follow the words "to the heirs of his body."

This devise was of an estate-tail general to **Thomas Stansbury, Jr.**, and the only contention is as to the operation of the words which follow the limitation of the estate to the heirs of **Thomas Stansbury's** body. By regular conveyances in which all parties interested united, this estate-tail was, on the 14th of August, 1817, docked, and turned into a fee in **Thomas Stansbury, Jr.** The life tenants are all dead, and **Thomas Stansbury, Jr.**, died in 1857, leaving an heir of his body, who is now dead; but by his will dated as hereinbefore stated, he gave all his property of every kind to his wife, the appellant, who has continuously held and tilled the same ever since her husband's death. The contract under which she agreed to sell to the appellees was dated May 28, 1890. These facts are all a part of the case stated in the record.

There can be no doubt that the testator intended to give the property to his grandson **Thomas Stansbury** and the heirs of his body, so long as he had any, for there is no effort to devise over, except on failure of such heirs. The devise over was bad for want of proper restriction of such failure; and we only advert to it for the purpose of noting the fact that there was no attempt to devise over to take effect because of failure to hold and till the land, but only on failure of heirs of the body.

It was a condition subsequent which was attempted to be imposed on the devisee and the heirs of his body; and that condition was, in our opinion, wholly inoperative and void. It was an attempt to do that which the law will not permit to be done. He undertakes to prescribe the way in which the property was to be enjoyed by the holders thereof, as his devisees in fee-tail, which estate, by the docking of the entail, has become a fee; and which estate, by force of the act of 1820, would have descended as a fee even without the docking conveyances. For some reason not disclosed, but possibly with the hope of promoting thrift and preventing the squandering of the estate, the testator tries to prevent their failure to cultivate the land, and endeavors to insure its being kept in the family, by making its retention a condition of continuing to

hold it. The devise is to the grandson, "and the heirs of his body, so long as they hold and till the same." Manifestly it is a condition the testator designed should follow the land into the hands of the successive takers as heirs of the body of the devisee. To "hold," in that connection, must mean "to retain," "to keep." These are meanings assigned to the word in Worcester's Dictionary, and are the only meanings which make sense in that connection.

In Anderson's Dictionary of Law, as relating to land, it is said to embrace the idea "of actual possession." The same authority says that, in the *habendum* clause of a deed "to have and to hold," etc., the word "to hold" includes the two-fold idea of actual possession of the thing and being invested with the legal title. The definition in Burrill's Law Dictionary of the word "hold" is to the same effect. In *Leazure v. Hillegas*, 7 Serg. & R. 320, it has the meaning of "retain." It would seem, therefore, to be a plain attempt to restrain alienation, which is void as against public policy.

"Conditions are not sustained when they are repugnant to the nature of the estate granted, or infringe upon the essential enjoyment and independent rights of property, and tend manifestly to public inconvenience. A condition annexed to a conveyance in fee, or by devise, that the purchaser or devisee should not alien, is unlawful and void": 4 Kent's Com. 143, 144; 5 Vin. Abr., p. 103, pl. 22; *Gleason v. Fayerweather*, 4 Gray, 348. The condition under consideration more clearly indicates a design to restrain the alienation of the estate devised than the language of the will in *Newkerk v. Newkerk*, 2 Caines, 346, where the devise was to persons "in case the same continue to inhabit the town of Hurley, otherwise not." In this last-mentioned case the court held that it was in restraint of alienation, and consequently void. The *pro forma* decree dismissing plaintiffs' bill will be reversed, and the cause will be remanded, that a decree may pass for the specific performance of the contract of sale set up.

Decree reversed and cause remanded.

DEVISE — EFFECT OF CONDITION IN RESTRAINT OF ALIENATION. — A devise by a husband to his wife of his estate, in trust for the benefit of herself and child, with the power of alienation taken away, creates a life estate in the widow for the use of herself and child, and the child takes the remainder in fee at the death of the mother: *Koenig v. Kraft*, 87 Ky. 95; 12 Am. St. Rep. 463, and note. See extended note to *Smith v. Towers*, 9 Am. St. Rep. 404-408. Where there is a devise of a life estate, the power of the devisee

to alienate it cannot be restricted by subsequent provisions in the will: *McCormick etc. Machine Co. v. Gates*, 75 Iowa, 343. See *Baylor v. Balch*, 34 W. Va. 438, for an instance of a devise in which the devisee took a fee-simple in the property devised, notwithstanding an attempted limitation upon his power of sale.

TRAGESER v. GRAY.

[73 MARYLAND, 250.]

POLICE POWER—REGULATION OF SALE OF INTOXICATING LIQUORS—CONSTITUTIONAL LAW.—A statute providing that no license for the sale of intoxicating liquors by retail shall be granted, except to citizens of the United States of temperate habits and good moral character, is a valid exercise of the police power of the state as to both citizens and aliens, and is not in conflict with the fourteenth amendment to the United States constitution, providing that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws.”

Joseph D. Hewisler and Frederick C. Cook, for the appellant.

William S. Bryan, Jr., for the appellee.

BRYAN, J. The act of 1890, chapter 343, prescribed a new system for the regulation of the sale of intoxicating liquors in the city of Baltimore. A board was established, consisting of three commissioners, invested with a power of granting licenses to sell these liquors by retail. Every one applying for such license was obliged to file his petition with the board, setting forth a number of statements tending to show that he was a fit person to be licensed. It was required to be verified by his own affidavit, and also to be sustained by a certificate of at least ten respectable persons, declaring that they were acquainted with the petitioner, and that they had good reason to believe that all the statements of the petition were true, and that they therefore prayed that the license should be issued to him. Provision was also made for giving extended notification of the petition, by advertisement in two newspapers of general circulation in the city, and also for the public hearing of this petition, and the petition of other persons in favor of granting the license, and also remonstrances against granting it. It was further provided that licenses to sell by retail should be granted only to citizens of the United States of temperate habits and good moral character. A number of other regulations were made, which it is not now necessary to state; but they all show extreme and anxious

solicitude on the part of the legislature to diminish the evils arising from the excessive use of ardent spirits. If the commissioners should grant the license, the applicant was required to pay to the clerk of the court of common pleas \$250; and thereupon it became the duty of the said clerk to issue it.

Trageser, a native of Prussia, and not a naturalized citizen of the United States, instituted this proceeding for the purpose of testing the validity of this law. He contends that the law is null and void, and that he has a right to obtain a license under the law which was in force before this statute was passed. He accordingly applied to John T. Gray, the clerk of the court of common pleas, for a license to sell spirituous liquors by retail, and offered to pay him the sum of fifty dollars, which was the license fee under the former law. The clerk refused to issue the license, and thereupon Trageser filed a petition in Baltimore city court for a writ of *mandamus* to compel the issue. After answer and demurrer thereto, the city court dismissed his petition. The case is brought to this court by petition in the nature of a writ of error, and the sole question presented is, whether the statute is a valid and constitutional enactment.

Under every system of government there must be power in some of its departments to provide for the regulation of the internal affairs of the state. Public morals, public health, public order, peace, and tranquillity are objects of cardinal importance to the well-being of society. Without the power to protect and preserve these interests, civilized governments could not exist. The limits and extent of this power are somewhat vague and undefined. Private interests are frequently found in opposition to the public good, and cases may doubtless occur in which it will be a matter of great difficulty and delicacy to settle with justice their conflicting pretensions. But it is not necessary to decide such questions until they arise. The merits of the present controversy will be ascertained by the application of sound principles, under the guidance of authoritative adjudications. The habit of drunkenness, and the evils attendant upon it, have always received a considerable degree of attention from the law-making power. And when we consider the poverty, misery, ruin, and wretchedness which intoxication entails upon its unhappy victims, and the unspeakable woes which must be endured by helpless and innocent beings dependent upon them, and also the fre-

quent crimes and disorders produced by the same cause, we may measure in some degree the necessity for a legislative remedy, if one can be found. Every consideration connected with the public welfare imperatively demands it. It is a duty which the legislature cannot evade. Their power over the whole subject under the constitution of this state cannot at this day be questioned. They may prohibit the sale of spirituous liquors entirely if they see fit to do so; or they may restrict it in any manner which their discretion may dictate. No one can claim, as a right, the power to sell, either at any time, or at any place, or in any quantity. If he is allowed to sell under any circumstances, it is simply by the free permission of the legislature, and on such terms as it sees fit to impose. In the law which we are now considering, the legislature hedged around this traffic with such safeguards as were deemed advisable for the purpose of protecting the public interest. It was an effort to restrict the licenses to such persons as would not abuse the privilege conferred; to this end the applicant was required to establish his fitness for the privilege by abundant testimony, and to promise, under oath, that he would not permit on his premises certain violations of the law which have frequently been associated with the traffic, and which have caused great scandal, immorality, and disorder. And by section 653 j, it was enacted that the license should be refused in all cases whenever, in the opinion of the said board, such license is not necessary for the accommodation of the public, or the petitioner or petitioners is or are not fit persons to whom such license should be granted; and if sufficient cause shall at any time be shown, or proof be made to the said board that the party licensed was guilty of any fraud in procuring such license, or has violated any law of the state relating to the sales of intoxicating liquor, the said board shall, after giving notice to the person so licensed, revoke said license; and the criminal court of the city may in like manner revoke said license, if the party should be convicted before it of any such violation." It was thought proper to confine the license to citizens of the United States of temperate habits and good moral character. The privilege is very liable to be abused, and abuses would produce great public detriment. It therefore seemed wise to the legislature to confer it only on those who, being natives of the country, might reasonably be supposed to have a regard for its welfare; or who, not being natives, had, as required by the nat-

uralization law, proven by credible testimony before a court of justice that they were attached to the principles of the constitution of the United States, and were well disposed to their good order and happiness. It was certainly the function of the law-making department to exercise its judgment on this question, and this court has no right to criticise its conclusion. We do not think that this law is, in any manner, in conflict with the constitution of this state.

We regard it as included "in that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government": *Gibbons v. Ogden*, 9 Wheat. 203. It has been uniformly held in all courts that no clause in the federal constitution interferes with the power of the states to promote and protect the public health, peace, morals, and good order within their respective limits. In *Kidd v. Pearson*, 128 U. S. 1, the supreme court decided that a state has the right to prohibit or restrict the manufacture of intoxicating liquors within its limits, to prohibit all sale and traffic in them, and to inflict penalties for such manufacture and sale. We quote a passage relating to the manufacture, and necessarily it is equally applicable to sales: "We have seen that whether a state, in the exercise of its undisputed power of local administration, can enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, is not any longer an open question before this court." And it was further said that this power of local administration, usually called the police power, was as broad and plenary as the taxing power. It is, however, maintained by the appellant that, although this statute was passed apparently for the purpose of exercising this power, yet it is in conflict with the Fourteenth Amendment, because it denies to persons not citizens of the United States the right to obtain licenses to retail liquor, and thereby makes an unconstitutional discrimination against them. The section of the amendment supposed to be involved is in these words: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It cannot be said that any man, alien or citizen, has a natural right to retail intoxicating liquor. According to *Bartemeyer v. Iowa*, 18 Wall. 129, it is not one of the privileges and

immunities of citizens of the United States. In *Mugler v. Kansas*, 123 U. S. 623, it was said that "such a right did not inhere in citizenship," and that it could not be said that government interfered with or impaired any one's constitutional rights of liberty or property, when it prohibited the manufacture and sale of intoxicating drinks. And it was held that this prohibition might be made, although it would destroy or greatly diminish the value of manufactories which had been erected when it was lawful to engage in such business. In *Kidd v. Pearson*, 128 U. S. 1, a statute of Iowa prohibited the the manufacture or sale of intoxicating liquors except for mechanical, medicinal, culinary, and sacramental purposes; but any citizen of the state was permitted to manufacture or buy and sell for these purposes, except hotel-keepers, keepers of saloons, eating-houses, grocery-keepers, and confectioners. The supreme court decided that the statute did not in any way contravene any provision of the Fourteenth Amendment. We see that the privilege granted was confined to citizens of the state, and that there was a discrimination against five classes of these citizens. But in truth the valid exercise of the police power does not depend on any question of discrimination for or against particular persons or classes of persons. It is confided to the wisdom of the legislature to make such application of it as the public welfare may require. In the case of occupations which may become injurious to the community they may prohibit them altogether, or they may permit them only in certain localities, and on certain terms, and under certain restrictions, or they may grant the privilege of pursuing them to some persons and deny it to others. Individual interests are not all considered in the exercise of this power. They must yield when they are in opposition to the public good. And the legislature is to determine what measures will best promote the public good in dealing with these matters. In *Mugler v. Kansas*, 123 U. S. 623, it was said that it was not to be supposed that the Fourteenth Amendment was intended to impose restraints on the exercise of the police power by the states. It was also said that a state could not, by any contract, limit its exercise of this power where the public health and the public morals would be prejudiced; and a case was cited with approval (*Stone v. Mississippi*, 101 U. S. 814), where a charter to conduct a lottery had been granted to a private corporation for a large moneyed consideration, and was afterwards repealed, and the repeal was

sustained, as within the police power of the state. And in the same case the court stated with great emphasis the necessity of upholding state police regulations which were enacted in good faith, and which had appropriate and direct connection with that protection to life, health, and property which each state owes to its citizens. And in this case, and subsequently in *Powell v. Pennsylvania*, 127 U. S. 684, it was shown that a statute enacted in good faith for the exercise of the police power could not be regarded as repugnant to the Fourteenth Amendment, unless it had no real or substantial relation to the objects of such power. In the *Slaughter House Cases*, 16 Wall. 36, it was held that in the exercise of the police power the state of Louisiana could lawfully grant to a single corporation, for twenty-five years, the exclusive privilege of maintaining slaughter-houses in a district of country containing more than eleven hundred square miles, and including the city of New Orleans. The trade of a butcher, though of great utility and necessity, is liable under some circumstances to injure the public health, and was therefore subject to this sort of legislation.

There are cases, unquestionably, in which discriminations against particular persons or classes of persons would be unlawful. They are indicated in *Powell v. Pennsylvania*, 127 U. S. 684, and in many other cases, especially in the cases affecting the legislation of California on the subject of the Chinese. It is held that every one has a right to pursue an ordinary calling on terms of equality with all other persons in similar circumstances, — that is, a calling not in any way injurious to the community, or likely to become so. The court did not, in *Powell v. Pennsylvania*, 127 U. S. 684, regard the making of oleomargarine as an ordinary business; nor in *McGahey v. Virginia*, 135 U. S. 662, was the traffic in ardent spirits so regarded. In the Chinese cases, *In re Parrott*, 6 Saw. 349, *In re Ah Chong*, 6 Saw. 451, and *Yick Wo v. Hopkins*, 118 U. S. 356, the legislation in question was directed against the Chinese, and was intended to prevent them from earning a livelihood by their own labor; or, at least, to impede and embarrass them as much as possible in their efforts to do so. This was most clearly evident, not only from the statutes and ordinances themselves, but from the article in the constitution of California under which they were framed. This article (19th) was entitled "Chinese," and it provided that no corporation should employ, directly or indirectly, in

any capacity, any Chinese or Mongolians; that no Chinese should be employed on any state, county, municipal, or other work, except in punishment for crime; it declared that the presence of foreigners ineligible to become citizens (meaning the Chinese) was dangerous to the well-being of the state; and the legislature were directed to discourage their immigration by all means within their power, and were also directed to delegate all necessary power to the incorporated cities and towns of the state for the removal of Chinese beyond their limits, or for their location within prescribed portions of those limits; and were also directed to provide the necessary legislation to prohibit the introduction of Chinese into the state. One of the judges in Parrott's case said of this article: "It is in open and seemingly contemptuous violation of the provisions of the treaty which give to the Chinese the right to reside here with all the privileges, immunities, and exemptions of the most favored nation. It is in fact but one and the latest of a series of enactments designed to accomplish the same end": *In re Parrott*, 6 Saw. 365. It was apparent to the courts which decided these cases that although the statutes and ordinances in question were in the form and fashion of police regulations, yet in reality, in substance, and in effect they were enactments to take away from the Chinese the right to labor for a living.

They struck at those inalienable rights which belong to human beings at all times and in all places. They denied them the equal protection of the laws in particulars essential to their means of existence. Their evident effect and purpose were to accomplish an unconstitutional result, and therefore they were necessarily declared to be void. The statute now before us oppresses no one, and was intended to oppress no one. It does not take from any man a solitary right, privilege, or immunity. It subjects no one to penalties for its violation which are not imposed equally on all offenders. It does not, it is true, make an equal partition of the privilege of liquor-selling among all classes of persons. But there is no warrant for supposing that legislative control over this traffic must conform to any such standard. It is not crippled by any such restraint. It overrides all private interests, and embraces all means which are necessary and proper to protect the public from evils connected with the subject. Assuredly the supreme court did not consider this control as limited by the necessity of making an equal distri-

bution of favors when it said, in speaking of the trade in liquor and its consequences: "The police power which is exclusively in the states is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority": *Mugler v. Kansas*, 123 U. S. 659. Nor is any such limitation consistent with the decisions in *Stone v. Mississippi*, 101 U. S. 814, *Beer Co. v. Massachusetts*, 97 U. S. 25, and *Fertilizing Co. v. Hyde Park*, 97 U. S. 659. In one of these cases a franchise which had been purchased from the state was taken away from the purchaser without compensation to him, because it was considered by the legislature to be hurtful to the public morals. In the other two cases, by the exertion of the police power, property of vast amount was rendered valueless, although it had been acquired under the express sanction of the legislature. It is needless to refer again to the *Slaughter House Cases*, 16 Wall. 36, where there was a severe discrimination in favor of a single corporation and against every one else, solely because the protection of the public health was involved.

It has been maintained that the appellant (Trageser) has rights under existing treaties which have been infringed by the denial of licenses to aliens. Our opinion on this question has been sufficiently indicated. But a few words more may be added. If we assume, for the sake of argument, that Trageser has under treaties every right which a citizen could have, the answer is, that no citizen of the United States can complain because a police regulation denies him the privilege of selling liquor, even if the privilege is granted to other citizens. We are unable to conceive that any one, citizen or alien, can acquire rights which could in any way control, impair, impede, limit, or diminish the police power of a state. Such power is original, inherent, and exclusive; it has never been surrendered to the general government, and never can be surrendered without imperiling the existence of civil society.

The act of assembly involved in this controversy being, in our opinion, in all respects a valid law, it is perhaps unnecessary to say anything more; but we will observe that even if the clause relating to aliens were unconstitutional, the other portions of the statute would not be affected. Aliens could not even, in that event, obtain licenses to retail liquor without the approval of the board of commissioners.

The order refusing the *mandamus* must be affirmed.

POLICE POWER — DEFINITION OF. — Police power is the right of a state to prescribe regulations for the good order, peace, comfort, and protection of the community which does not encroach upon the federal constitution: *New Orleans etc. Co. v. Hart*, 40 La. Ann. 474; 8 Am. St. Rep. 544. The power to provide for the regulation and sale of spirituous liquors, so as to guard against abuses and prevent disorder, is a valid exercise of the police power of the state: *Commonwealth v. Kimball*, 24 Pick. 359; 35 Am. Dec. 326, and extended note. A license law providing that licenses to retail intoxicating liquors shall be granted only to male inhabitants of the state is not in conflict with the constitution of the United State: *Welsh v. State*, 126 Ind. 71.

SUSQUEHANNA FERTILIZER COMPANY v. MALONE.

[78 MARYLAND, 268.]

NUISANCE. — TRADE OR BUSINESS carried on in such manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, is a wrong done to the adjoining or neighboring owner, for which an action for nuisance will lie, without regard to the locality where the business is carried on, though it may be lawful, and useful to the public, and managed and conducted with the best and most approved appliances and methods.

NUISANCE — CONVENIENT PLACE — REASONABLE USE. — At no place can a nuisance be maintained on the ground that it is convenient for the carrying on of the business, if such business causes substantial injury to the property of another; nor can any use of one's land be said to be a reasonable use which deprives an adjoining owner of the lawful use and enjoyment of his property.

NUISANCE, WHAT CONSTITUTES, QUESTION OF LAW. — In actions to abate nuisances, the question whether the place where the trade or business complained of is carried on is a proper and convenient one for the purpose or not, or whether the use by the defendant of his own land is, under all the circumstances, a reasonable use or not, ought to be determined by the court, and not submitted to the jury.

NUISANCE — DEFENSE THAT PLAINTIFF CAME TO IT. — Where a fertilizer factory is complained of as a nuisance by an adjoining land-owner, the fact that he came to the nuisance is no defense, in the absence of a claim of prescriptive right by defendant.

NUISANCE — FERTILIZER FACTORY — ADMISSIBILITY OF EVIDENCE IN DEFENSE. — Where a fertilizer factory is complained of as a nuisance by an owner of adjoining land, evidence of the loss or injury which the owners of other fertilizer factories in the neighborhood might sustain if such business is held to constitute a nuisance, or of the amount invested in such factories, is inadmissible in defense.

NUISANCE — FERTILIZER FACTORY — COMPARATIVE LOSS NO DEFENSE. — Where a fertilizer factory is complained of as a nuisance by an adjoining land-owner, no effort will be made to balance the inconveniences, or to estimate the difference between the injury sustained by the plaintiff, and the money invested and loss that may result to the defendant from having its business as carried on found to be a nuisance. The neighbor-

ing owner is entitled to the reasonable and comfortable enjoyment of his property, and if his rights in this respect are invaded, he is entitled to protection, let the consequences be what they may.

W. L. Marbury and Charles Marshall, for the appellant.

R. R. Boarman and D. G. McIntosh, for the appellee.

ROBINSON, J. - This is an action for a nuisance, and the questions to be considered are questions of more than ordinary interest and importance. At the same time, it does not seem to us that there can be any great difficulty as to the principles by which they are governed. The plaintiff is the owner of five dwelling-houses on Eighth Avenue, in Canton, one of the suburbs of Baltimore City. The corner house is occupied and kept by the plaintiff as a kind of hotel or public house, and the other houses are occupied by tenants. On the adjoining lot is a large fertilizer factory, owned and operated by the defendant, from which, the plaintiff alleges, noxious gases escape, which not only cause great physical discomfort to himself and his tenants, but also cause material injury to the property itself. The evidence on the part of the plaintiff shows that this factory is used by the defendant for the manufacture of sulphuric acid and commercial fertilizers; that noxious gases escape therefrom, and are driven by the wind upon the premises of the plaintiff and of his tenants; that they are so offensive and noxious as to affect the health of plaintiff's family, and, at times, to oblige them to leave the table, and even to abandon the house. It further shows that these gases injure materially his property, discolor and injure clothing hung out to dry, stain the glass in the windows, and even corrode the tin-spouting on the houses.

The evidence on the part of the defendant is in direct conflict with the evidence offered by the plaintiff; but still, assuming the facts testified to by plaintiff's witnesses to be true,—and this was a question for the jury,—an actionable injury was done to the plaintiff, for which he was entitled to recover. No principle is better settled than that where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to the neighboring owner, for which an action will lie; and this, too, without regard to the locality where such business is carried on; and this, too, although the business may be a lawful business, and one use-

ful to the public, and although the best and most approved appliances and methods may be used in the conduct and management of the business: *Attorney-General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. App. 147; *Pinckney v. Ewens*, 4 L. T., N. S., 741; *Stockport Water Works Co. v. Potter*, 7 Hurl. & N. 160; *Rylands v. Fletcher*, L. R. 3 Eng. & Ir. App. 330. As far back as *Poynton v. Gill*, 2 Rolle Abr. 140, an action, it was held, would lie for melting lead so near the plaintiff's house as to cause actual injury to his property, even though the business was a lawful one, and one needful to the public; "for the defendant," say the court, "ought to carry on his business in waste places, and great commons remote from inclosures, so that no damage may happen to the owner of adjoining property." And the doctrine thus laid down has been to this day the doctrine of every case in which a similar question has arisen.

We cannot agree with the appellant that the court ought to have directed the jury to find whether the place where this factory was located was a convenient and proper place for the carrying on of the appellant's business, and whether such a use of his property was a reasonable use, and if they should so find, the verdict must be for the defendant. It may be convenient to the defendant, and it may be convenient to the public; but, in the eye of the law, no place can be convenient for the carrying on of a business which is a nuisance, and which causes substantial injury to the property of another. Nor can any use of one's own land be said to be a reasonable use which deprives an adjoining owner of the lawful use and enjoyment of his property. The only case which gives countenance to such a doctrine is *Hole v. Barlow*, 4 Com. B., N. S., 334, decided in 1858, in which it was held that if the place where the bricks were burnt was a proper and convenient place for the purpose, the defendant was entitled to a verdict, notwithstanding the burning of the bricks may have interfered with the physical comfort of the plaintiff. And it was upon the authority of this case that in *Bamford v. Turnley*, 31 L. J. Q. B. 286, where an action was brought for a nuisance arising from the burning of bricks on the defendant's land, near the plaintiff's house, Cockburn, C. J., directed the jury that if they thought the spot was a convenient and proper one, and the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict,

although the burning of the bricks was an interference with the plaintiff's comfort.

This ruling was, however, on appeal to the exchequer chamber, reversed, and in the opinion delivered by Mr. Justice Williams, and concurred in by Erle, C. J., Keating, J., and Wilde, B., after referring to a passage in Comyn's Digest, on which the decision in *Hole v. Barlow*, 4 Com. B., N. S., 334, was founded, he says:—

“In *Hole v. Barlow*, however, the court appear to have read the passage as containing a doctrine that a place may be ‘proper and convenient’ for the carrying on of a trade, notwithstanding it is a place where the trade cannot be carried on without causing a nuisance to a neighbor. This is a doctrine which has certainly never been judicially adopted in any case before that of *Hole v. Barlow*, and moreover, the adoption of it would be inconsistent with the judgments pronounced in some of the cases cited at the bar during the argument, and more especially with the case of *Walter v. Selfe*, 4 De Gex & S. 315, 326. And the introduction of such a doctrine into our law would, we think, lead to great inconvenience and hardship. . . . If it be good law that the fitness of the locality prevents the carrying on of an offensive trade from being an actionable nuisance, it appears necessarily to follow that this must be a reasonable use of the land. But if it is not good law, and if the true doctrine is, that whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance, according to the ordinary rule of law, an action will lie, whatever the locality may be, then surely the jury cannot properly be asked whether the causing of the nuisance was a reasonable use of the land.”

The question was again fully considered in *Tipping v. St. Helen's Smelting Co.*, 4 Best & S. 608, where an action was brought for a nuisance caused by noxious vapors proceeding from the smelting-works of the defendant, and the verdict being for the plaintiff, a motion was made for a new trial, on the ground of misdirection by Mellor, J., before whom the case was tried at the Liverpool summer assizes in 1863. In overruling the motion, Cockburn, C. J., said: “The direction of my brother Mellor cannot be found fault with if looked at by the light of the decision of the majority of the judges of the exchequer chamber in *Bamford v. Turnley*. That decision

overruled the previous one of the common pleas in *Hole v. Barlow*, and establishes that where a case of nuisance is sought to be made out, it is not a right question to put to the jury to say whether the place where the act was done was a proper and convenient one for the purpose, or whether the doing it in that place was a reasonable use by the defendant of his own land." An appeal was then taken to the house of lords, and in his argument Sir Roundell Palmer contended that the learned judge who tried the case had misdirected the jury, inasmuch as sensible discomfort from carrying on a necessary trade in an ordinary and proper manner, and in a convenient and suitable locality, was not an actionable injury.

The lord chancellor said: "It is said that, inasmuch as this copper-smelting is carried on in what the appellant contends is a fit place, it may be carried on with impunity, although the result may be the utter destruction, or the very considerable diminution, of the value of the plaintiff's property. I apprehend that that is not the meaning of the word 'suitable,' or the meaning of the word 'convenient,' which has been used as applicable to the subject. The word 'suitable' unquestionably cannot carry with it this consequence: that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighboring property. Of course, I except cases where any prescriptive right has been acquired by a lengthened user of the place."

Lord Cranworth said: "In stating what I always understood the proper question to be, I cannot do better than adopt the language of Mr. Justice Mellor: 'It must be plain that persons using a lime-kiln, or other works which emit noxious vapors, may not do an actionable injury to another, and that any place where such an operation is carried on so that it does occasion an actionable injury to another is not, in the meaning of the law, a 'convenient place.'"

So we take the law to be well settled, that in actions of this kind the question whether the place where the trade or business is carried on is a proper and convenient place for the purpose, or whether the use by the defendant of his own land is, under the circumstances, a reasonable use, are questions which ought not to be submitted to the finding of the jury.

We fully agree that in actions of this kind the law does not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; that in determin-

ing the question of nuisance in such cases, the locality and all the surrounding circumstances should be taken into consideration; and that where expensive works have been erected and carried on which are useful and needful to the public, persons must not stand on extreme rights, and bring actions in respect of every trifling annoyance, otherwise business could not be carried on in such places. But still, if the result of the trade or business thus carried on is such as to interfere with the physical comfort, by another, of his property, or such as to occasion substantial injury to the property itself, there is wrong to the neighboring owner for which an action will lie: *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642.

But then it is said there was a fertilizer factory on the lot on which the appellant's works are now erected, and that this factory was used for the manufacture of sulphuric acid and fertilizers several years before the plaintiff built his house, and that the plaintiff has no right to complain, because he "came to the nuisance." But this constitutes no defense in this action.

If the appellant had acquired a prescriptive right,—that is to say, a user of the place for twenty years,—that would present a different question. But no such right is claimed in this case. And that being so, the appellant had no right to erect works which would be a nuisance to the adjoining land owned by the plaintiff, and thus measurably control the uses to which the plaintiff's land may in the future be subject. It could not, by the use of its own land, deprive the plaintiff of the lawful use of his property.

The question of coming to a nuisance was fully considered in *Bliss v. Hall*, 4 Bing. N. C. 183, where, in an action for a nuisance arising from carrying on the business of making candles, the defendant pleaded that he had carried on his business at the same place, in the same manner, and to the same extent, three years before the plaintiff became possessed of his messuage. In sustaining the demurrer to this plea, Tindal, C. J., says: "That is no answer to the complaint in the declaration; for the plaintiff came to the house he occupies with all the rights which the common law affords, and one of them is a right to wholesome air. Unless the defendant shows a prescriptive right to carry on his business in the particular place, the plaintiff is entitled to judgment."

Park, J., in *Elliotson v. Feetham*, 2 Bing. N. C. 134, said

that the defendant should at least have alleged a holding of twenty years' duration. Here he does not go beyond three.

And in *Crump v. Lambert*, L. R. 3 Eq. Cas. 409: "Whether one," says Lord Romilly, "comes to the nuisance or the nuisance comes to him, he still retains his right to have the air that passes over his land pure and unpolluted." And so in *Tipping v. St. Helen's Smelting Co.*, L. R. 1 Ch. App. 66, Vice-Chancellor Page-Wood held that the fact that the plaintiff had come to the nuisance did not disentitle him to relief in equity.

It does not seem to us, therefore, that the defendant has any reason to complain of the several instructions granted by the court at the request of the plaintiff, or to the refusal of its own prayers. If there was any error on the part of the court, it was, perhaps, in granting the defendant's fifth prayer, to which, however, we take it for granted the defendant company makes no objection.

Now, as to the evidence offered in the first exception, it does not seem to us that the fact that five hundred thousand dollars had been invested in other fertilizer factories in the neighborhood could have any bearing upon the issues before the jury. The defendant had already proved that there was a number of fertilizer factories in the neighborhood, and had offered evidence tending to prove that the nuisance complained of was caused by these factories. Such evidence as this was admissible and proper evidence. But the fact that five hundred thousand dollars had been invested in other works in the neighborhood could not in any manner affect the plaintiff's right to recover. The only effect of such evidence, it seems to us, would be to show what loss or injury the owners of these factories might sustain, if the business carried on by them should be found to be a nuisance.

But that was not a question for the consideration of the jury. The law, in cases of this kind, will not undertake to balance the conveniences, or estimate the difference between the injury sustained by the plaintiff, and the loss that may result to the defendant from having its trade and business, as now carried on, found to be a nuisance. No one has a right to erect works which are a nuisance to a neighboring owner, and then say he has expended large sums of money in the erection of his works, while the neighboring property is comparatively of little value. The neighboring owner is entitled to the reasonable and comfortable enjoyment of his

property, and if his rights in this respect are invaded, he is entitled to the protection of the law, let the consequences be what they may.

Judgment affirmed. —

NUISANCE — DEFINITION. — Any unreasonable use by a person of his own property to the injury of others is a nuisance, and renders the owner liable for damages arising therefrom: *Laflin etc. Powder Co. v. Tearney*, 131 Ill. 322; 19 Am. St. Rep. 34; *State v. Yopp*, 97 N. C. 477; 2 Am. St. Rep. 305, and note; *Ashbrook v. Commonwealth*, 1 Bush, 139; 89 Am. Dec. 616, and note; *Keiser v. Mahanoy etc. Gas Co.*, 143 Pa. St. 276; *Meiners v. Frederick Miller etc. Co.*, 78 Wis. 364; *Shivery v. Streeper*, 24 Fla. 104.

NUISANCE — WHETHER A QUESTION OF LAW OR FACT. — A party maintaining a nuisance is not entitled to a jury trial in proceeding for its abatement: *Hart v. Mayor of Albany*, 9 Wend. 571; 24 Am. Dec. 165. See note to *Young v. State Bank*, 58 Am. Dec. 632. The question whether a thing is a nuisance must be settled as a question of fact: *Des Plaines v. Poyer*, 123 Ill. 348; 5 Am. St. Rep. 524, and note; *Johnson v. Borson*, 77 Wis. 593.

NUISANCE — PRESCRIPTIVE RIGHT — INADEQUATE DEFENSE. — It is no defense to the maintenance of a nuisance that there are similar establishments in the neighborhood, and that they were there before plaintiffs came there: *Laflin etc. Powder Co. v. Tearney*, 131 Ill. 322; 19 Am. St. Rep. 34; *Hurlbut v. McKone*, 55 Conn. 31; 3 Am. St. Rep. 17; *People v. Detroit etc. Lead Works*, 82 Mich. 471.

NUISANCE — LOSS OF PARTY MAINTAINING, NO DEFENSE. — It is no defense to a nuisance that it is necessary to the operation of the business of the one maintaining it: *Shively v. Cedar Rapids etc. R'y Co.*, 74 Iowa, 169; 7 Am. St. Rep. 471, and note.

BRADSHAW v. LANKFORD.

[73 MARYLAND, 428.]

CONSTITUTIONAL LAW — DELEGATION OF LEGISLATIVE POWER. — A statute making the common right of the people of the whole state to take oysters from its waters depend upon the result of the popular vote of persons residing in any number of the election districts of a certain county, as to whether or not the taking of oysters by scoop or dredge within the waters of such county by any person shall be prohibited, is unconstitutional. The legislature cannot delegate its power to a county to regulate or deny a right common to the people of the whole state.

MANDAMUS to compel the issuance of a license to take oysters with scoop or dredge in any of the waters of Somerset County. Judgment dismissing the petition, and the petitioner appealed.

Thomas S. Hodson, for the appellant.

William Pinkney Whyte, attorney-general, for the appellee.

ROBINSON, J. By the act of 1890, chapter 629, the question whether or not the taking of oysters by scoop or dredge within the waters of Somerset County shall be prohibited was submitted to the voters of certain election districts of said county; and should a majority of the votes cast be in favor of the prohibition, the act provided it should be unlawful for any person to take oysters by scoop or dredge within the waters of said county.

The question before us is, whether this statute is a valid exercise of legislative power; or in other words, whether the legislature had the power to submit such a question to the voters of the districts named in the act, and make the operation of the act depend upon the contingency of a popular vote.

Now, it can hardly be necessary to say that, by the constitution of this state, the power to enact laws belongs to the general assembly, composed of the senate and the house of delegates; and this being so, it is a well-settled principle of constitutional law that the power thus delegated cannot be redelegated to the people themselves. Our government is a representative government, and to the members of the general assembly the people have confided the power to pass such laws as they, in the exercise of their judgment, may deem best for the public interests; and they have no power to substitute the judgment of others in matters of legislation for the judgment of those to whom this sovereign trust has been committed.

But, fundamental as this principle may be, it is subject to certain qualifications, some of which are well recognized, both in this country and in England. No one questions the power of the legislature to charter municipal corporations, and to confer upon such corporations the power to pass laws and ordinances in regard to matters pertaining to local legislation. And it seems to be quite well settled, in this country at least, that not only may the municipal authorities themselves pass such laws and ordinances, but the legislature may refer laws in regard to local affairs to the voters of the municipality for their acceptance or rejection: Cooley's Constitutional Limitations, 144, and cases referred to in notes.

Upon the same principle, counties, although not possessing the general powers of municipal corporations under special charters, are regarded as *quasi* corporations, and it seems to be well settled that questions of local concern,—whether, for

instance, a county seat once located shall be removed elsewhere, or whether the county shall subscribe to a particular improvement,—these and other like questions of local legislation may be referred to the voters of the county for decision: *Commonwealth v. Judges of Quarter Sessions*, 8 Pa. St. 391; *Call v. Chadbourne*, 46 Me. 206; *Commonwealth v. Painter*, 10 Pa. St. 214; *Slinger v. Henneman*, 38 Wis. 504; *Goddin v. Crump*, 8 Leigh, 129; *Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 475.

Upon the same principle, too, it has been held in this state that laws passed under the police powers of the state regulating or forbidding the sale of intoxicating drinks, commonly known as “local-option laws,” may be submitted to the voters of an election district of a county, and the operation of such laws made to depend upon the result of a popular vote in said districts: *Hammond v. Haines*, 25 Md. 541; 90 Am. Dec. 77; *Fell v. State*, 42 Md. 71; 20 Am. Rep. 83.

We shall not stop to consider the reasons on which these cases are based; whatever may be the reasons, the decisions were made upon full consideration, and are binding upon us. In all these cases, however, the several statutes considered by the court were local in their operation, and affected the people only to whom they were referred for their approval or rejection. But the act of 1890 now before us can in no sense be considered a local law affecting only the people of the several election districts to whom it was submitted for their decision. On the contrary, if a majority of the voters of these districts should be in favor of the prohibition, the act makes it unlawful for any person in the state to take oysters by scoop or dredge within the waters of Somerset County. It thus deprives the people of the entire state of the common right which they enjoyed to take oysters by scoop or dredge within the waters of said county. Now, the oyster-beds within the waters of Somerset County do not belong to the people of that county, much less to the voters of certain election districts of the county, to whom the operation of the act was submitted. They belong to the state, and although the legislature, representing the sovereign power of the state, may pass laws regulating the taking of oysters within the waters of the state, it would be against every principle of sound legislative policy, and repugnant to the maxim which forbids the delegation of legislative power, to hold that it is competent for the legislature to make the operation of a statute thus affecting the common right of the people of the whole state depend upon

the result of a popular vote of persons residing within three or four or any given number of election districts of a county. We have no disposition to extend the exceptions to the general maxim which wisely forbids the delegation of legislative power, beyond the cases to which we have referred, and the principles on which they are based. We fully concur in what was said in *Hammond v. Haines*, 25 Md. 562, 90 Am. Dec. 77, that "the general assembly, composed of the senate and house of delegates, is in this state the only law-making power. . . . With them is lodged the power of making laws for the government of the people, and the due responsibility of the representative to his constituents is best maintained, and stable and wholesome legislation secured, by avoiding judicial refinements by which this power is extended to any whom the constitution has not invested with legislative action."

Order reversed, and cause remanded, with order to issue the writ of *mandamus*.

CONSTITUTIONAL LAW — DELEGATION OF LEGISLATIVE AUTHORITY. — An act providing that it shall be unlawful to allow cattle to run at large in any county which, by a majority vote, should agree to restrain them is unconstitutional, as a delegation of legislative power: *Lammert v. Lidwell*, 62 Mo. 188; 21 Am. Rep. 411. For the same reason, a statute authorizing the creation of a municipal corporation upon the petition of a majority of its inhabitants is unconstitutional: *Territory v. Stewart*, 1 Wash. 98.

All laws of a general nature must have a uniform operation throughout the state: *State v. Ellet*, 47 Ohio St. 90; 21 Am. St. Rep. 772, and note; *Utsey v. Hiott*, 30 S. C. 260; 14 Am. St. Rep. 910, and note.

A police law to take effect upon local adoption is not unconstitutional: *Boyd v. Bryant*, 35 Ark. 69; 37 Am. Rep. 6, and note. A statute authorizing the establishment of township high schools on a vote of the people is valid: *Richards v. Raymond*, 92 Ill. 612; 34 Am. Rep. 151. The taking effect of a statute affecting a particular county may be made dependent upon the vote of the county: *Commonwealth v. Weller*, 14 Bush, 218; 29 Am. Rep. 407, and note. The authorizing of towns to take charge of their public schools by a majority vote is constitutional: *Werner v. Galveston*, 72 Tex. 22.

LONG v. STATE.

[78 MARYLAND, 527.]

LOTTERY — PRIZE PACKAGE — GIFT ENTERPRISE. — A scheme by which packages of coffee contain on either end a pasted slip of paper containing the words "one plate," "one plate," "one saucer," and which, when detached by the buyer of a package of coffee and presented to seller, entitles the former to two plates and a saucer in addition to the coffee, is within the meaning of a statute prohibiting "any scheme or device by way of gift enterprises of any kind or character."

Benjamin Kurtz, for the appellant.

William Pinkney Whyte, attorney-general, for the appellee.

FOWLER, J. The appellant was indicted in the criminal court of Baltimore City for violating section 185, article 27, of the code of Public General Laws, which provides that "no person or body corporate shall be permitted, either directly or indirectly, by agent or otherwise, to barter, sell, or trade, or to offer for barter, sale, or trade, by any publication, or in any way, any wares, goods, or merchandise of any description, in package or bulk, holding out as an inducement for any such barter, sale, or trade, or the offer of the same, any scheme or device by way of gift enterprises of any kind or character whatsoever."

The indictment contained two counts. In the first the appellant was charged with unlawfully selling merchandise in a package, to wit, coffee, holding out as an inducement for such sale a certain scheme or device by way of a gift enterprise; and the second count charges him with keeping a certain place or house for selling lottery tickets.

To this indictment the appellant demurred, upon the ground that the act of 1886, chapter 480, upon which the said indictment is based, is unconstitutional and void, and the court, having overruled this demurrer, the appellee abandoned the second count, which related to the sale of lottery tickets, and elected to stand upon the first count.

The case was tried before the court without a jury, and the appellant was found "guilty on the first count."

But, as appears by the record, no final judgment has been entered, and the demurrer not being before us, the only question presented is as to the admissibility of the testimony excepted to, which is as follows:—

"That the defendant, Long, kept a general grocery store at No. 1731 Pennsylvania Avenue, known as the 'Northern Cen-

tral Supply Store'; that on the nineteenth day of September, 1890, the witness Reilly purchased at said store from the witness Clarke (the latter being a clerk in the employ of the defendant), for the sum of twenty-five cents each, three one-pound packages of ground coffee, called the 'Big Bonanza Coffee'; that on each of said packages so purchased was pasted a blue slip of paper about three quarters of an inch wide and extending nearly around the package; that the outside of this slip was blank, but on the inside of each slip was printed respectively the following: 'one plate,' 'one plate,' 'one saucer'; and that said slips of paper were pasted at either end of said packages in such manner as to be easily torn off; that the witness Reilly tore said slips of paper from said packages and presented them to the witness Clarke, who thereupon presented him with three pieces of small crockery-ware, consisting of two plates and one saucer, which were produced at the trial and offered in evidence; that these pieces of crockery were obtained by the witness Clarke from a collection or assortment of crockery-ware on exhibition in said store, and in view of customers, and that there was also displayed in the show-window of said store a number of packages of said coffee, and pieces of said crockery-ware, and a notice or card to this effect: 'A piece of this crockery-ware given with each pound.'"

If the scheme which is thus shown by the evidence to have been adopted by the appellant, and which certainly is not characterized by any originality, is not a gift enterprise, it would be difficult to find words to describe it. Without discussing the decisions of courts of other states referred to in the argument, we base our opinion upon our own statute, which in express terms prohibits "any scheme or device by way of gift enterprise of any kind whatsoever."

Finding no error, the ruling of the court below will be affirmed.

Ruling affirmed, and cause remanded.

LOTTERY — PRIZE PACKAGE. — A scheme by which a person who pays five cents for a package of tea is entitled to select from it a number of envelopes, some of which contain a ticket which entitles the purchaser to a prize, while others contain nothing but tea, is a lottery: *State v. Boneil*, 42 La. Ann. 1110; 21 Am. St. Rep. 413, and note. See note to *Ballock v. State*, 73 Md. 1; *ante*, p. 565.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

ALDWORTH *v.* CITY OF LYNN.

[153 MASSACHUSETTS, 53.]

NUISANCE, PERMANENT. — DAMAGES WILL BE ALLOWED ONLY TO THE COMMENCEMENT OF THE ACTION for injury sustained by plaintiff from the maintenance of a dam and reservoir by the defendant, from which water percolated, saturating plaintiff's land, though such dam and reservoir were constructed for permanent use, if the court cannot see that the defendant may not reconstruct them in such a way as to prevent the continuance of the percolation with much less expenditure than would be required to pay for a permanent injury to the plaintiff's land.

MUNICIPAL CORPORATION IS LIABLE TO AN ACTION FOR DAMAGES resulting from the negligent or improper construction or maintenance by it of a dam or reservoir which it was authorized by statute to make and maintain. The rule is otherwise when due and reasonable precautions are taken, and nothing is done wantonly or negligently, so as to cause unnecessary damages.

EVIDENCE OF THE CONDITION OF LAND BEFORE IT WAS AFFECTED BY THE NUISANCE complained of is admissible for the purpose of enabling the jury to determine whether, and to what extent, it has been affected by such nuisance.

EVIDENCE TO SHOW BIAS. — Where the plaintiff is a land-owner suing to recover for injuries suffered by the maintenance of a dam and reservoir, the transfer to him from his grantor of all claims for damages accruing to him while he owned the same land is not admissible for the purpose of proving bias.

TORT to recover for damages resulting to the plaintiff from the construction and maintenance by defendant, a municipal corporation, of a dam and reservoir from which water percolated and flowed upon the land of plaintiff. The answer of defendant consisted of a general denial, and an averment that the works complained of were constructed and maintained

under authority of an act of the legislature of the state. On the trial the defendant excepted to the admission of the testimony of a witness showing the condition of plaintiff's land with reference to water in the year 1873, before the dam was constructed, and to the refusal of the court to admit, for the purpose of showing bias on the part of the plaintiff, a transfer to her by her grantor of all claims of the latter for damages suffered from the dam prior to the grant, and also to the refusal of the court to rule that this action could not be maintained other than by petition. Verdict for the plaintiff; both parties appealed.

H. F. Hurlburt, for the plaintiff.

J. R. Baldwin, for the defendant.

KNOWLTON, J. This action is to recover damages for a use of the defendant's premises which was injurious to the plaintiff's adjoining land; or in other words, for the maintenance of a nuisance. The plaintiff excepted to the ruling that she was entitled to recover damages only to the date of her writ, and contended that the dam and pond were permanent, and that she was entitled to damages for a permanent injury to her property. An erection unlawfully maintained on one's own land, to the detriment of the land of a neighbor, is a continuing nuisance, for the maintenance of which an action may be brought at any time, and damages recovered up to the time of bringing the suit: *Prentiss v. Wood*, 132 Mass. 486; *Wells v. New Haven etc. Co.*, 151 Mass. 46; 21 Am. St. Rep. 423, and cases there cited. That it is of a permanent character, or that it has been continued for any length of time less than what is necessary to acquire a prescriptive right, does not make it lawful, nor deprive the adjacent land-owner of his right to recover damages. Nor can the adjacent land-owner in such a case, who sues for damage to his property, compel the defendant to pay damages for the future. The defendant may prefer to change his use of his property so far as to make his conduct lawful. In the present case, we cannot say that the defendant may not repair or reconstruct its dam and reservoir in such a way as to prevent percolation, with much less expenditure than would be required to pay damages for a permanent injury to the plaintiff's land. As was pointed out in *Wells v. New Haven etc. Co.*, 151 Mass. 46, 21 Am. St. Rep. 423, it appeared in *Fowle v. New Haven etc. Co.*, 107 Mass. 352, 112 Mass. 334, 17 Am. Rep. 106, that the

parties in a former suit had elected to treat the injury as permanent, and the plaintiff had accepted entire damages for the future as well as the past, and on that ground, which is adverted to in the last opinion, the case was well decided. In *Goslin v. Corry*, 7 Man. & G. 342, 345, where a defendant, on the trial of an action for a libel, permitted evidence to be given of damage caused after action brought, Tindal, C. J., said: "By permitting this evidence to be given, the defendant may possibly have escaped having a second action brought against him. It was therefore far from an impolitic thing to allow damages to be assessed for the whole cause of complaint in one action." So far as there are intimations in the successive opinions in *Fowle v. New Haven etc. Co.*, 107 Mass. 352, 112 Mass. 334, 17 Am. Rep. 106, which seem to make the case an authority for the plaintiff's contention in the case at bar, we are not inclined to follow them. The ruling was correct, and the plaintiff's exceptions must be overruled.

The defendant excepted to the refusal of the court to rule "that this action could not be maintained other than by petition." No question was raised upon the form of the declaration, nor is the evidence reported. It is therefore to be assumed that the evidence was sufficient for the maintenance of the action, if such evidence could be legitimately introduced under the pleadings. The declaration set out a good cause of action at the common law. The defendant alleged in justification that the pond was made and maintained under the provisions of the Statutes of 1871, c. 218. If the defendant had shown that all due and reasonable precautions were taken in the construction and maintenance of the dam and reservoir, and that nothing was done wantonly or negligently, so as to cause unnecessary damage to the property of the plaintiff, the defense would have been made out. For all damages resulting from the proper exercise of the authority given the defendant by the statute, the plaintiff's remedy was by petition. But for damages resulting from a negligent or improper construction or maintenance of the dam and reservoir, the plaintiff might recover at the common law. It is to be assumed that the jury were so instructed, and that the evidence warranted their verdict: *Mellen v. Western R. R. Corp.*, 4 Gray, 301.

The testimony of the witness Mullen was rightly received. It was proper to show the condition of the land before the

original dam was built, to assist the jury in determining whether the pond had affected its condition.

The paper offered by the defendant was incompetent. It did not show bias on the part of the plaintiff. The defendant's exceptions must also be overruled.

Exceptions overruled.

NUISANCE — PERMANENT. — When a nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage is original, and may be at once compensated: *St. Louis etc. R'y Co. v. Biggs*, 52 Ark. 240; 20 Am. St. Rep. 174, and note; *Troy v. Cheshire R. R. Co.*, 23 N. H. 83; 55 Am. Dec. 177. A railway company permitting water to stand upon its right of way, which is prevented from flowing off, on account of an embankment, is liable to persons injured thereby for maintaining a permanent nuisance: *Lockett v. Fort Worth etc. R'y Co.*, 78 Tex. 211.

NUISANCE — LIABILITY OF MUNICIPAL CORPORATIONS FOR IMPROPER CONSTRUCTION OF WORK. — A municipal corporation is liable for injuries sustained on account of maintaining upon its property an improperly constructed privy well: *Briegel v. Philadelphia*, 135 Pa. St. 451; 20 Am. St. Rep. 885, and note; *Cardington v. Fredericks*, 46 Ohio St. 442.

NUISANCE — EVIDENCE. — Evidence of the condition of the premises prior to the nuisance complained of is admissible on the trial for the nuisance: *State v. Holman*, 104 N. C. 861; *Rosenthal v. Taylor etc. R'y Co.*, 79 Tex. 325.

ROBERTS v. FRENCH.

[153 MASSACHUSETTS, 60.]

SALE OF LAND AT AUCTION INDUCED BY MISREPRESENTATION OF QUANTITY.

— If, at an auction sale of a lot of land, one of the auctioneers states that he has assisted in measuring it, and that it is of certain dimensions, which he specifies, one who purchases, relying on such statements, is not bound by his bid, and may recover any payment made by him, though the sale was made on the premises, and they were inclosed by visible fences, and the purchaser knew that the property sold did not extend beyond them.

F. H. Pearl, for the plaintiff.

M. A. Pingree, for the defendant.

HOLMES, J. This is an action to recover two hundred dollars paid by the plaintiff as part payment of the price of a lot of land for which he made the highest bid at a sale by auction. The advertisements described the lot as containing about 11,000 square feet, and as extending 130 feet on the east. The plaintiff's evidence tended to show that at the sale one of the firm of auctioneers read the advertisement and said that the defendant's husband and himself had measured

the land (as they had done), and that its dimensions were as stated in the posted bill, except as to the easterly line, which was only 107 feet long. The other auctioneer then proceeded to sell the property, and said that the easterly line was 107 feet long, that the lot contained about 11,000 square feet, and that a warranty deed would be given. The sale took place on the premises; the plaintiff was familiar with them, and he understood that he was buying only the land inclosed by the fences. But, according to his evidence, he believed the statements of the auctioneers as to the length of the lines and the area, and made his bid relying upon them, and we may fairly say by inference, being more or less induced by them to purchase. The easterly line in fact was only 95½ feet long; the other lines varied somewhat from the lengths given at the sale, and the contents were 7,760 feet, being 565 feet less than what they would have been if the length of the lines stated at the sale had been correct. The defendant has not offered a deed describing the premises as they were described by the auctioneer, but only a deed describing them correctly. The court below ruled that the action could not be maintained, and the plaintiff excepted.

On the foregoing evidence, plainly the jury might have found that the auctioneer made a misstatement of fact as to the length of the easterly line, and also represented that he made the statement on the faith of his own senses, because, as he said, he and the defendant's husband (who, by the way, was also her agent, and was present and assenting to what the auctioneer said) had measured the line. In other words, the statement of the length was a statement, as of the party's own knowledge, of the kind which our decisions pronounce fraudulent: *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403; 9 Am. St. Rep. 727. Notwithstanding the plaintiff's knowledge of how the land looked, the jury also might have found that the statement in fact deceived him, and induced him to buy, and that it materially varied from the truth. It is true that the agreement was to buy a lot with known boundaries, and very likely, in the absence of fraud, the rule would apply that monuments govern distances in such agreements and in deeds with warranty: *Noble v. Goo-gins*, 99 Mass. 231; *Powell v. Clark*, 5 Mass. 355; 4 Am. Dec. 67; *Rawle on Covenants*, 5th ed., sec. 297. But that is only a rule of construction; it does not mean that measurements are not material, or that a man who knows the monuments can-

not be deceived about them: See *Lewis v. Jewell*, 151 Mass. 345; 21 Am. St. Rep. 454. Of course it was not necessary that the plaintiff's belief as to the length should have furnished his only motive for buying, if it furnished one motive: *Safford v. Grout*, 120 Mass. 20, 25; *Windram v. French*, 151 Mass. 547; and if the defendant's agents knew that the representations would affect action on the part of the bidders, or if under the known circumstances it manifestly was likely to do so.

The ruling of the court below probably assumed all that we have said, but was based on the cases which hold fraudulent representations as to the contents of a piece of land the boundaries of which are pointed out to the buyer not to be actionable: *Gordon v. Parmelee*, 2 Allen, 212; *Mooney v. Miller*, 102 Mass. 217.

We do not mean to question these decisions in the slightest degree, but it is obvious that there must be a limit beyond which fraudulent representations cannot be made with impunity; and upon the whole, we are of opinion that, if the plaintiff's evidence is believed, the representations made to him under the circumstances in which they were made, went beyond that limit. When a man conveys "the notion of actual admeasurement" (*Hill v. Buckley*, 17 Ves. 394, 401, cited in 99 Mass. 233), still more when he says that he has measured a line himself and has found it so long, his statement has a stronger tendency to induce the buyer to refrain from further inquiry (*Parker v. Moulton*, 114 Mass. 99, 100; 19 Am. Rep. 315), than a statement of the contents of a lot without giving grounds for the estimate. If false, it is a grosser falsehood. It purports on its face to exclude the suggestion that it is a mere estimate, which the other leaves open: See *Cabot v. Christie*, 42 Vt. 121, 126; 1 Am. Rep. 313; *Deming v. Darling*, 148 Mass. 504, 505. If it is made at a sale by auction, where it is out of the question for a bidder to go and verify it before making his bid, it seems to us reasonable to say that the purchaser has a right to rely upon it, as was held in a very similar case in Connecticut: *Stevens v. Giddings*, 45 Conn. 507. See *Lewis v. Jewell*, 151 Mass. 345; 21 Am. St. Rep. 454; *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486, 489; *Porter v. Fletcher*, 25 Minn. 493.

New trial granted.

FRAUD — FALSE REPRESENTATIONS IN SALE OF LAND. — Misrepresentations made by a vendor of land as to some material fact, knowing at the time they were false, and upon which the vendee relies, are actionable: *Williams v.*

McFadden, 23 Fla. 143; 11 Am. St. Rep. 345, and note; *Cabot v. Christie*, 42 Vt. 121; 1 Am. Rep. 313; *Putman v. Bromwell*, 73 Tex. 465; *Phelps v. James*, 79 Iowa, 262; *McGibbons v. Wilder*, 78 Iowa, 531. Where false statements as to the quantity of land are fraudulently made, the plaintiff, who relies upon them, will not be denied a recovery because he failed to measure the land: *Ledbetter v. Davis*, 121 Ind. 120. A mere misstatement as to the quantity of land sold is not sufficient to prove fraud: *Griswold v. Gebbie*, 126 Pa. St. 353; 12 Am. St. Rep. 878, and note.

CHASE v. LADD.

[153 MASSACHUSETTS, 126.]

WILLS—CONSTRUCTION OF DEVISE. — If a testator gives and devises all his property to his wife, “to her use and behoof forever,” but provides that if any of such property shall not be expended by her for her support and maintenance during her lifetime, it shall be disposed of in a manner designated in the will, it does not vest the property in her absolutely, but merely confers on her a right to use it for her support, and, if necessary for that purpose, to dispose of it during her life, leaving whatever she has not so disposed of to vest, after her death, in other persons as provided in the will.

BILL by the administrator *de bonis non* of Thomas H. Chase against the executor of Ann L. Chase and the Danvers Savings Bank to compel payment of a deposit. At the death of Thomas H. Chase, he had an account with the savings bank, which his wife, after his death, caused to be transferred to her name, and she afterwards added to it the proceeds of lands sold by her, but which had belonged to him. The question was, whether this deposit belonged to his estate or to hers, and that question, in turn, depended upon whether or not all his property was given to her absolutely by his will, which, so far as material, was as follows: “2. All the rest and residue of my estate, real, personal, or mixed, of which I shall die seised and possessed, or to which I shall be entitled at the time of my decease, I give, devise, and bequeath to my beloved wife, Ann L. Chase, to her use and behoof forever. Provided, however, that my said wife shall cause to be erected on my lot in Merrimack Cemetery, in said West Newbury, a handsome marble monument worth at least five hundred dollars; also, to put the monument now standing on my lot in said cemetery on the lot where Jane Jaques is buried. All to be paid for by my said wife out of the estate which I have given to her. Provided, also, that if any of the property which I have given my beloved wife afore-

said shall not have been expended by her for her support and maintenance during her lifetime, then and in that case my will is, that so much of said estate as shall remain unexpended at the time of her decease shall be disposed thereof in manner following, to wit." After this clause in the will were bequests aggregating three thousand five hundred dollars to sundry designated legatees, "to their own use and behoof forever."

B. B. Jones, for the plaintiff.

W. H. Moody, for the executor.

FIELD, C. J. The principal differences between this case and *Joslin v. Rhoades*, 150 Mass. 301, are, that the devise in *Joslin v. Rhoades* is to the wife, and "her heirs and assigns forever," and in the present case it is to the wife, "to her use and behoof forever," and that in *Joslin v. Rhoades* there is no express or implied restriction upon the right or power of the devisee to dispose of the estate, unless it is to be inferred from the "condition that if any portion of my said estate should remain in the possession of my said wife at the time of her decease, such remainder shall be divided" as expressed in the will, while in the present case it is distinctly implied that the wife shall have the power of expending the property only "for her support and maintenance during her lifetime," and it is provided that "so much of said estate as shall remain unexpended at the time of her decease shall be disposed" of as expressed in the will. We are inclined to the opinion that these differences are significant, and that the most reasonable construction of the will is, that the testator intended that the wife should have the use of the property for her support and maintenance, with the power of expending it,—that is, of selling and conveying it, and using the proceeds only so far as was necessary for her reasonable support and maintenance during her life,—but with no other power of disposing of the property, or of any part of it. The words of the first part of the clause do not so plainly convey the property absolutely, or in fee-simple, that the subsequent proviso must necessarily be considered as inconsistent with them, and the meaning of the proviso is clear. There is no doubt of the intention of the testator to dispose of what remains at the death of his wife unexpended for her support and maintenance, and we see no insuperable difficulties in carrying this

intention into effect. None of our decisions in which it has been held that the property was given absolutely, and that the remaining provisions were inconsistent with such a gift and were void, requires us to reach that conclusion from the particular words of this will, although there are cases closely resembling the present, which certainly is very near the line which separates the decisions: See *Kent v. Morrison*, 153 Mass. 137, *infra*; *Bamforth v. Bamforth*, 123 Mass. 280; *Smith v. Snow*, 123 Mass. 323; *Schmaunz v. Goss*, 132 Mass. 141; *Kelley v. Meins*, 135 Mass. 231; *Damrell v. Hartt*, 137 Mass. 218; *Welsh v. Woodbury*, 144 Mass. 542; *Joslin v. Rhoades*, 150 Mass. 301.

The provisions in this clause of the will concerning the monuments are not, we think, very material. Undoubtedly, the wife was given power to sell, for this purpose, so much of the property as was necessary.

Demurrer overruled.

DEVISE TO WIDOW — CONSTRUCTION OF — WHETHER IN FEE OR FOR LIFE. — A devise of land to the testator's widow, "to be for her sole use and benefit so long as she shall live, with power to dispose of the same if necessary for her support and comfort in this life," vests in her the power to dispose of the fee if necessary, though the will provided that whatever is left after her death should go to the heirs of the testator: *Larsen v. Johnson*, 78 Wis. 300; 23 Am. St. Rep. 404, and note fully discussing this subject; *Kent v. Morrison*, 153 Mass. 137, *infra*.

KENT v. MORRISON.

[153 MASSACHUSETTS, 137.]

WILLS — CONSTRUCTION OF DEVISE. — If a will gives and devises to the testator's wife all his property, "giving her full power to sell or convey same by deed (part or all of it), the proceeds are to be used for her comfort, and otherwise, as she may think proper," but declares that whatever remains after her death, not specifically disposed of by her, is to be used for the benefit of his sons, such will vests in her an estate for life, with power to convey the fee by deed.

CONVEYANCE — POWER TO DEED, WHEN INCLUDES POWER TO MORTGAGE. — If a will vests the testator's wife with a life estate in his property, with power to sell or convey the same by deed, and to use the proceeds for her comfort, or otherwise, as she may think proper, she has power to mortgage.

MORTGAGE — POWER OF GUARDIAN OF INSANE PERSON TO MAKE. — Under the statutes of Massachusetts, a guardian of an insane person has authority to make any election or waiver, and to do any other act which his ward might have done but for his insanity, and may therefore exercise a power to mortgage conferred by a will on such ward.

BILL to remove certain mortgages as clouds upon complainant's title. These mortgages were executed by the guardian of *Mehitable Kent*, acting under the license and authority of the probate court, and whether he had power to execute them depended upon the will of her deceased husband, which, so far as material, was as follows: "2. I give, devise, and bequeath to my beloved wife, *Mehitable Kent*, all the estate, both real and personal, that I die seised and possessed of, giving her full power to sell and convey the same by deed (part or all of it), and the proceeds thereof are to be used for her comfort, and otherwise, as she may think proper. 3. After the decease of my said wife, all that remains of my estate, not specifically disposed of by her, is to be used for the benefit of my two sons, *Joshua Kent* and *Oscar F. Kent*, their heirs and assigns; and my request is, that some suitable person may be appointed trustee to receive and take charge of said estate, which is to be used for their benefit as said trustee may think proper."

W. L. Thompson, for the plaintiff.

E. T. Burley, for the defendant.

FIELD, C. J. The general principle applicable to this class of cases is, that when it appears that the testator intended to give to the devisee absolutely a fee-simple in real property, the testator cannot attach to it a quality or condition which in law is inconsistent with such an estate. The testator cannot say that although the devisee shall hold the property absolutely in fee-simple after it has vested in him, yet if he does not convey it in his lifetime, or devise it by will, it shall not descend as his property, but shall be considered as the property of the testator, and shall pass as a part of the testator's estate. If, however, the estate given to the devisee is only for his life, although coupled with a power in the devisee of disposing of the fee, either by deed or will, or both, then if this power is not executed, the remainder in fee after the termination of the life estate is a part of the estate of the testator, and will pass under the will of the testator, or if there are no provisions in the will affecting it, will descend as the real estate of the testator.

The first real difficulty in this case is in determining what construction shall be put upon the words of the will. Taking all the words together which relate to this devise, we are of opinion that it was not the intention of the testator to give to

his wife a fee-simple in his real property. There are no words describing the estate given which are technically words of inheritance; a power to sell and convey the property in fee is expressly given, which would be unnecessary if the testator intended to devise the property in fee; and the power given is a power to sell and convey by deed, which, by implication, excludes any power of conveying the property by will, and such a restriction upon the power of disposition is inconsistent with an estate in fee-simple. All the words of the will are satisfied by holding that Mrs. Kent took an estate for her life, with a power of conveying the fee by deed: *Kelley v. Meins*, 135 Mass. 231; *Damrell v. Hartt*, 137 Mass. 218; *Welsh v. Woodbury*, 144 Mass. 542; *Joslin v. Rhoades*, 150 Mass. 301; *Copeland v. Barron*, 72 Me. 206.

It has been argued that if she took only an estate for her life, with a power to convey the fee by deed, she could not have conveyed it by a deed of mortgage, but only by an absolute deed. When the intention in giving the power is that real estate may be converted out and out into money, such a power does not authorize a mortgage. Where a life estate was given for maintenance, with a power "to sell and convey any and all of my real estate if necessary to secure such maintenance," it was held that it did not authorize a mortgage: *Hoyt v. Jaques*, 129 Mass. 286. The power in the present case is "to sell and convey the same by deed (part or all of it), and the proceeds thereof are to be used for her comfort, and otherwise, as she may think proper." This is a power to sell for any purpose, and to use the proceeds in any manner the devisee may think proper. Under it the devisee may sell all or any part of the real property, and make the proceeds her own, whether necessary for her support or not. Such a power is as ample as that of an owner, only it must be executed by deed. It is an absolute and unrestricted power to sell for the benefit and in the discretion of the devisee of the power, and we think that this includes a power to mortgage; See *Zane v. Kennedy*, 73 Pa. St. 182; *Loebenthal v. Raleigh*, 36 N. J. Eq. 169.

The remaining question is, whether such a power could be executed by the guardian of Mrs. Kent, under a license from the probate court, for the purpose of raising money for her support, she having been adjudged insane. The Public Statutes, c. 30, sec. 11, provide that "the probate court may, on petition of a guardian, and if after due notice and hearing

thereon it appears to be necessary or expedient, authorize such guardian to mortgage any real estate of his ward." The Public Statutes, c. 139, sec. 36, provide that "when property, rights, or benefits given by will or by provision of law depend upon the election, waiver, or other act of a person incompetent by reason of insanity or minority to exercise or perform the same, the guardian of such person may make such election or waiver, or perform such act." Without considering whether the first of these provisions, standing alone, would authorize the guardian to execute mortgages of the fee, and not merely of the life estate, we are of opinion that the execution of the mortgages made in this case was authorized by the last of these provisions taken in connection with the first. The mortgages, therefore, are valid; and as the bill is brought only for the purpose of having them discharged as a cloud upon the title, the bill must be dismissed.

So ordered.

DEVISE TO WIDOW—CONSTRUCTION OF—WHETHER FOR LIFE OR IN FEE: See note to *Larsen v. Johnson*, 23 Am. Rep. 404; *Chase v. Ladd*, 153 Mass. 126; *ante*, p. 614.

POWER TO SELL DOES NOT INCLUDE POWER TO MORTGAGE.—A power to one to sell personal property does not warrant him in mortgaging it: *Switzer v. Wilvers*, 24 Kan. 384; 36 Am. Rep. 259.

POWER OF GUARDIAN OF INSANE PERSON.—The guardian of an insane person is a substitute for his ward with reference to all his interests: *Anderson v. Anderson*, 42 Vt. 350; 1 Am. Rep. 334.

COBB v. COVENANT MUTUAL BENEFIT ASSOCIATION.

[153 MASSACHUSETTS, 176.]

INSURANCE—REPRESENTATIONS.—Where one asserts that certain statements are true, and if not true, that this fact shall avoid a policy of insurance, the question whether they were actually material is not important, as the parties have the right to make their truth the basis of the contract; but if the applicant merely averred that the statements were true to the best of his knowledge and belief, then the policy cannot be avoided on account of them, unless he did not know or believe them to be true.

INSURANCE—LIFE—NEGATIVE ANSWER TO THE QUESTION, "HAVE YOU PERSONALLY CONSULTED A PHYSICIAN, been prescribed for, or personally treated within the past ten years?" will avoid a policy of insurance if the applicant had, within the time named, being, as he supposed, in need of a physician, gone to one for the purpose of consulting him as to what was the matter, had an interview, answering questions, and receiving aid, advice, or assistance from him. The question thus an-

swered in the application should not be considered as referring to any specific disease. If the applicant had consulted a physician, who had prescribed for him, and administered a hypodermic injection of morphine, he was personally treated within the meaning of the interrogatory.

INSURANCE — LIFE — PRESCRIPTION DEFINED. — A judge, being requested by a jury to define the word "prescription," responded as follows: "If the insured went to a physician for the purpose of getting his aid, advice, or assistance as a physician, in a difficulty under which he was then suffering, or supposed himself to be suffering, and the physician, hearing what the insured had to say, as a physician, and for the purpose of relief, or cure, or aid, or assistance, gave to the insured medicine, then it may be said that such a physician prescribed for him." It was held that this response was correct, and was not subject to the objection that it was a charge upon the facts.

JURY TRIAL — CHARGE UPON FACTS. — If a judge, in response to a request from the jury to define a certain word, gives a definition thereof, and adds: "And it is your duty, as jurors, to so find, whether the consequences may be as you would wish them to be, or otherwise," — this addition does not convert the definition into a charge upon the facts, nor is it improper.

H. M. Knowlton and G. E. Williams, for the plaintiff.

A. E. Avery and W. O. Calkins, for the defendant.

The COURT. The subjoined opinion was prepared by Mr. Justice Devens, and was adopted as the opinion of the court after his death by the justices who sat with him at the argument.

By the terms of his application, which is referred to and made a part of the benefit certificate issued to the insured, he warranted the answers to the questions propounded "to be full, complete, and true," and agreed that the answers and application should form the exclusive and only basis of the contract between himself and the defendant; and further agreed that if "any misrepresentations or fraudulent or untrue answers" had been made, the contract should be null and void. The acknowledgment at the end of the application, which was subscribed by the insured, and which contains the agreement above referred to, controls and governs the answers to which it refers; nor does it seem important to determine whether they are to be treated as warranties which are to be literally complied with, or as representations only; as if the latter, they were material to the risk, and were so made and treated by the parties.

Where one asserts that certain statements are true, and that if not true, this fact shall avoid the policy, the question whether they were actually material is not important, as par-

ties have the right to make their truth the basis of the contract: *Miles v. Connecticut etc. Ins. Co.*, 3 Gray, 580; *McCoy v. Metropolitan L. Ins. Co.*, 133 Mass. 82; *Ætna L. Ins. Co. v. France*, 91 U. S. 510; *Powers v. North Eastern Mut. L. Ass'n*, 50 Vt. 630. The case at bar differs obviously from those in which an applicant has averred that the answers made by him are true according to his best knowledge and belief, or has limited his statement by other similar words. Such answers, if accepted by the insurer, would render it necessary for it to prove that, as thus limited, they were untrue: *Clapp v. Massachusetts Benefit Ass'n*, 146 Mass. 519.

The sixth question put to the applicant in form A of the application was, "Have you personally consulted a physician, been prescribed for, or professionally treated within the past ten years?" To this question the insured answered, "No"; and it has been found by the jury, upon the second issue submitted to them, that this answer was false. The plaintiff contended that such an issue should only be found against her in case the answer was intentionally false. In our view, the insured having made the truth of his statements the basis of his contract, it was sufficient for the defendant to show that this statement was actually untrue.

The plaintiff further contended that the question referred to in the application should be construed as referring to a specific disease, and that if the insured had consulted or been prescribed for by a physician for a pain that did not amount to a disease, his answer to this question would not prevent the plaintiff from recovering. The presiding judge declined to instruct the jury in accordance with this contention, and instructed them that if the insured, being, as he supposed, in need of a physician, went to one for the purpose of consulting him as to what was the matter with him, and had an interview, answering such inquiries as the physician deemed pertinent, receiving aid, advice, or assistance from him, that the insured consulted a physician within the meaning of the interrogatory; and further, that if they found that he went to a physician for the purpose of procuring aid and assistance from the physician as such, and the physician prescribed a remedy, or treated him professionally, either by giving him a prescription or by administering hypodermic injections of morphine (of which there was some evidence), then he was professionally treated within the meaning of the interrogatory, or professionally prescribed for. The ruling appears to us

correct. While the question whether the insured had a fixed disease, and what the disease was, might be an inquiry involved in considerable embarrassment, the question whether he had consulted a physician, or had been professionally treated by one, was simple, and one about which there could be no misunderstanding. Had it been replied to in the affirmative, the answer would have led to other inquiries. Indeed, the question which follows, which remained unanswered, is, "If so, give dates, and for what diseases." It is upon the existence of this latter question that the plaintiff founds an argument that it was necessary to show that the insured had some distinct disease permanently affecting his general health before it could be said that he answered this question untruthfully. But the scope of the question cannot be thus narrowed. Even if the insured had only visited a physician from time to time for temporary disturbances proceeding from accidental causes, the defendant had a right to know this, in order that it might make such further investigation as it deemed necessary. By answering the question in the negative, the applicant induced the defendant to refrain from doing this.

In *Metropolitan Ins. Co. v. McTague*, 49 N. J. L. 587, 60 Am. Rep. 661, it was held that where the applicant stated that he had not consulted a physician, or been prescribed for by one, and such statement was shown to have been false by proof of a prescription received, there could be no recovery, although it appeared to have been given for a cold. The court say: "That representation did not aver a condition of health, or that it was requisite or proper to consult a physician. It averred that he had not consulted a physician, or been prescribed for by a physician. The fact found contradicted this averment, whether the consultation and prescription related to a real disease or an apprehension of disease."

In the case at bar, after retiring to their room, the jury returned into court with a request that the court would define the word "prescription." There was evidence in the case from three physicians tending to show that, on more than one occasion when he had consulted with them, they had administered hypodermic injections for the pain which he was suffering, and also given him medicine. The presiding judge instructed the jury fully as to the meaning of a "prescription," and stated that "if the insured went to one

of those physicians, and received from him a medicine as a physician, for the purpose of assistance and relief in a difficulty under which he was then suffering or supposed to be suffering, then it is a prescription within the meaning of the law." The judge added: "And it is your duty, as jurors, so to find, . . . whether the consequences may be as you would wish them to be, or otherwise." The plaintiff excepted to the last paragraph, as a charge upon the facts, and the judge modified this, and said: "I will endeavor in this way to define a prescription, and let this definition stand for the definition objected to. If the insured went to a physician for the purpose of getting his aid, advice, or assistance as a physician, in a difficulty under which he was then suffering, or supposed himself to be suffering, and the physician, hearing what the insured had to say, as a physician, and for the purpose of relief, or cure, or aid, or assistance, gave to the insured medicine, then it may be said that such a physician prescribed for him." To this the plaintiff also objected, as a charge upon the facts, and contended that the jury should have been instructed that the word "prescription" was a word in common use, which they could define as well as the court. The latter instruction leaves clearly to the jury the inquiry whether the insured had gone to the physician, and received from him aid, assistance, medicine, etc., in answer to his application. We cannot see that it has any element of a charge upon the facts. The definition of a "prescription" was entirely correct, and even if a word in common use was explained, there was no reason why the judge should not define it in answer to the request, if he gave the jury an accurate definition.

The plaintiff also insists that the last clause of the definition as first given was a charge upon the facts. It is, perhaps, sufficient to say that it was clearly withdrawn, and the latter definition given in place of it. We do not, however, consider that the last clause of the first definition was a charge upon the facts within the meaning of the Public Statutes, c. 153, sec. 5. The judge had defined the word as to the meaning of which they had inquired, and submitted to them in a condensed way the evidence bearing upon the issue which they were to determine. Certain facts, if they find them to exist, he informs the jury, will make a prescription by a physician within the meaning of the law. He then adds: "And it is your duty, as jurors, so to find; and it is

your duty so to find, whether the consequences may be as you would wish them to be, or otherwise." Although the last clause is a caution to the jury to disregard the consequences which may follow their decision, there is no reason why a judge, when he deems it proper to do so in the trial, may not caution the jury not to be swayed by sympathy, prejudice, or passion, and direct them to be governed in their finding by the facts as they exist, without regard to the results that may follow therefrom.

On the back of the certificate, there is, among many other conditions, one which recites that the contract shall be subject to, and construed only according to, the laws of Illinois. The plaintiff relies on the case of *Continental Ins. Co. v. Rogers*, 119 Ill. 474, 59 Am. Rep. 810, as being the law of Illinois. In this case, it is said that, as a general rule, where the application for insurance on a person's life is expressly declared to be a part of the policy, and such statements are warranted to be true, they will be deemed material, whether actually so or not. But as a qualification, where a statement in a policy of insurance that the answers, statements, etc., in the application are warranted by the insured "to be true in all respects" is followed by the further statement "that if this policy has been obtained by or through any fraud, misrepresentation, or concealment, said policy shall be absolutely null and void," which fraud relates to the answers to the questions in the application, erroneous answers not material to the risk, honestly made in the belief that they are true, will not be so far binding on the insured as to present any obstacle to his recovery. The case is not decided on this point, but on the ground that whether answers are warranties or representations, the burden of proving their falsity is upon the defendant, — a proposition not controverted by the defendant in the case at bar. It is only on this last ground that the case can be held an authority for the law of Illinois.

In the case at bar, the policy is declared to be avoided, not only by misrepresentations and fraudulent answers, but by those which are untrue; and the question which is found to have been untruly answered must be deemed to have been made by the parties one material to the risk.

Bill dismissed.

INSURANCE — REPRESENTATIONS. — An application for life insurance warranted that the answers contained therein were true, and that if any of them were, in any material respect, untrue or false, the contract should be

void. A representation in such a policy is not fatal unless fraudulently false: *Schwarzbach v. Ohio etc. Union*, 25 W. Va. 622; 52 Am. Rep. 227, and note; *Southern etc. Ins. Co. v. Booker*, 9 Heisk. 606; 24 Am. Rep. 344; *Price v. Phoenix etc. Ins. Co.*, 17 Minn. 497; 10 Am. Rep. 166; *Wilkinson v. Connecticut etc. Ins. Co.*, 30 Iowa, 119; 6 Am. Rep. 657; *Miller v. Phoenix etc. Ins. Co.*, 27 Iowa, 203; 1 Am. Rep. 262; *McVey v. Grand Lodge United Workmen etc.*, 53 N. J. L. 17.

COVELL v. CHADWICK.

[153 MASSACHUSETTS, 263.]

LIBEL. — INJUNCTION WILL NOT ISSUE TO RESTRAIN defendant from libeling complainant when the libels complained of are nothing more than false representations as to the character and quality of his property and as to his title thereto.

TRADE-MARKS, RIGHTS OF ASSIGNEE OF. — If certain formulas, wrappers, and trade-marks have been used in the manufacture and sale of a patent medicine, but the person who manufactured and sold them has died, and his business has been discontinued, no one can acquire from the representative of the deceased any exclusive right to the use of the trade-marks as against another who had previously lawfully obtained the formulas for the preparation of the medicines.

BILL for damages, and to enjoin defendant from manufacturing and selling certain medicines under the names of "Dr. Spencer's Queen of Pain," and "Spinal Paste, or Salt Rheum Cure," and from using certain trade-marks, and from libeling complainant. At the trial the judge limited the testimony, — 1. To the transfers to the plaintiff and defendant respectively; 2. To the formulas from which they compounded their medicines; and 3. The dates when the parties began to use the labels and trade-marks. Dr. Spencer, in his lifetime, manufactured medicines by secret formulas, and sold them by the names mentioned above, and used certain labels and trade-marks. In May, 1884, about a year after the doctor's death, his widow expressed her wish that the defendant should have the trade-marks, labels, bottles and everything that went with the medicines, and handed the formulas to defendant. The widow soon afterwards died, and her sister then transferred to plaintiff a formula for manufacturing the same medicine. After this an administrator *de bonis non* of the estate of Dr. Spencer ratified the transfer to the defendant by the widow, but six months later he executed a formal transfer of the formulas to plaintiff, excepting, however, all rights and privileges heretofore granted by himself or any other legal representative of Dr. Spencer or of his widow.

E. Avery and T. F. Desmond, for the plaintiff.

E. L. Barney, for the defendant.

KNOWLTON, J. It appears by the report in this case that, at the hearing, there was no request that the evidence should be taken down with a view to a revision of the findings of fact by the full court, and it seems to have been the intention of the presiding justice to present upon this report merely the question whether the decree is supported by the facts found. There is nothing to indicate that the plaintiff, at the trial, expressed dissatisfaction with the direction given by the judge to the taking of testimony, or that he at any time intimated a desire to have that direction revised upon an appeal or a report; and we are of opinion that, on the report, it is not now open to the plaintiff to contend that he was injured by the limitation of the testimony to the questions considered.

But if it were open, we see no error in this particular. The appeal relates to nothing but the rights and the conduct of the parties in reference to names, letters, marks, devices, figures, formulas, and trade-marks, once used by Dr. Charles L. Spencer in connection with the manufacture of certain medicines. So far as the bill charges libels by the defendant on the plaintiff, unless he can show that they are something more than mere false representations as to the character or quality of his property, or as to his title thereto, he is not entitled to a remedy by injunction: *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69; 19 Am. Rep. 310; *Brandreth v. Lance*, 8 Paige, 24; 34 Am. Dec. 368; *Fleming v. Newton*, 1 H. L. Cas. 363, 376. His case depends upon his title, and the title of the defendant to that which once belonged to Dr. Spencer. The three questions in regard to which evidence was received seem to embrace everything which is material to the plaintiff's claims. At all events, the plaintiff has brought to our attention nothing which could have been important that has not been fully heard.

Sarah T. Spencer, the widow of Dr. Charles L. Spencer, was the administratrix of his estate, and the defendant, without fraud, obtained from her formulas for the preparation of the medicines, and she intended "that the defendant should have the right to use both formulas, with the labels, wrappers, etc., serving to identify the remedies." A few days after the death of Mrs. Spencer, and after the defendant had received the

formulas, the plaintiff obtained an oral transfer or delivery of them from Mrs. Stetson, who, so far as appears, had no authority to represent the estate of Dr. Spencer or of Mrs. Spencer in making the transfer. His first formal title was by a bill of sale given on December 16, 1887, by Alanson Borden, as administrator *de bonis non* of the estate of Charles L. Spencer, and as executor of the will of Sarah T. Spencer. But Borden had, by a formal instrument, previously ratified the conveyance by Mrs. Spencer to the defendant of the formula for the "Queen of Pain," and in the bill of sale he expressly excepted all rights and privileges previously given or granted by Dr. Spencer, or by himself, or by any other legal personal representative of either Dr. Spencer or Sarah L. Spencer. The question in the case is, whether the plaintiff acquired, as against the defendant, the exclusive right to use the trade-marks formerly used by Dr. Spencer.

In *Chadwick v. Covell*, 151 Mass. 190, 21 Am. St. Rep. 442, it was decided that this defendant acquired no such right; and upon the authority of that case, the defendant contends that the position of the plaintiff is at least no better than her own. It was there held that against any one honestly obtaining them, there was no exclusive right of property in the formulas, and that a mere transfer of the formulas would give no right to use the trade-marks which Dr. Spencer used. It was assumed that there was a gift of Dr. Spencer's trade-marks to the present defendant, which would have been valid if a trade-mark could have been conveyed to one whose only relation to him, or to the business carried on by him, was that of a donee of the formulas, marks, and labels which he had used; and it was held that the trade-marks were not property which could be conveyed to a mere purchaser or donee of the formulas in that way. It was said of the defendant: "She is not Dr. Spencer. She is not the owner of a manufactory once owned by him. She makes the medicine with her own ingredients, tools, plant, and contrivances. She has no exclusive right to make it. The defendant's use of the name does not mislead the public, any more than hers does as to the maker, the place of manufacture, or the nature or quality of the goods. Unless, therefore, it should be held that a trade-mark may be erected into a new species of property, capable of lasting as long as the world does and certain goods are manufactured, and of being transferred for value or by gift from person to person, irrespective of good-will, special

right to make the goods, place of manufacture, or fraud of any kind upon the public, the plaintiff cannot prevail." All this can be said with equal truth of the plaintiff in the present case. His only title from the representatives of Dr. Spencer was created more than four years and a half after Dr. Spencer's death. He was not the purchaser of a business which was then being carried on, in which the trade-marks were used. He did not acquire a right to manufacture medicine in the same place in which the trade-marks had been used, and his right to manufacture it was not exclusive. His bill of sale purports to sell him formulas which had previously been given to the defendant, and which anybody who could honestly obtain them might use; and as incidental to that sale, it purported to convey a right to use as trade-marks the labels and designs formerly used by Dr. Spencer. If this had been a sale of the business in which the trade-marks were being used, they would have passed by the conveyance: *Emerson v. Badger*, 101 Mass. 82; *Sohier v. Johnson*, 111 Mass. 238; *Gilman v. Hunnewell*, 122 Mass. 139; *Warren v. Warren Thread Co.*, 134 Mass. 247; *Russia Cement Co. v. Le Page*, 147 Mass. 206; 9 Am. St. Rep. 685; *Frank v. Sleeper*, 150 Mass. 583; *Kidd v. Johnson*, 100 U. S. 617, 620. But so far as appears, the business in which the trade-marks were used by the owner of them had been wound up several years before the plaintiff acquired his title, and the plaintiff did not buy a business, or the good-will of a business, or anything else which carried with it property in a trade-mark. The principles stated in *Chadwick v. Covell*, 151 Mass. 190, 21 Am. St. Rep. 442, control the present case.

Decree affirmed.

LIBEL — INJUNCTION TO RESTRAIN. — Equity has no jurisdiction to restrain a person from publishing in the records of a mercantile agency false representations as to the business standing of the plaintiff, if no breach of trust is involved: *Raymond v. Russell*, 143 Mass. 295; 58 Am. Rep. 137. Injunction will not lie to restrain a libel making a man ridiculous, unless some property rights have been invaded: *Brandreth v. Lance*, 2 Paige, 24; 34 Am. Dec. 268, and note. A publication by a manufacturer cautioning the public that certain goods of his manufacture, advertised by a tradesman as "first quality," were sold to him as "damaged" is not actionable: *Boynton v. Shaw etc. Co.*, 146 Mass. 219.

TRADE-MARKS — RIGHT TO RESTRAIN USE OF. — Where a patent medicine is manufactured and sold by a physician who dies, one person has no right to enjoin another from using the formulas of such physician, where his use is not a fraud upon the public nor an invasion of the rights of some other person: *Chadwick v. Covell*, 151 Mass. 190; 21 Am. St. Rep. 442, and note.

COMMONWEALTH v. LANNAN.

[153 MASSACHUSETTS, 287.]

LARCENY OF PROPERTY OBTAINED BY FRAUD. — One may be convicted of larceny of property which he obtained from another by fraud, premeditated trick, or device.

LARCENY OF PROPERTY, PART OF WHICH BELONGED TO THE THIEF. — One may be convicted of larceny who fraudulently obtained possession of a sum of money, to a small part of which he was entitled, with an intent at the time of misappropriating the whole to his own use.

LARCENY. — **AGENT WHO OBTAINED POSSESSION OF A SUM OF MONEY UPON HIS FALSE REPRESENTATION** that it was the amount necessary to be paid for certain land, which his principal desired to buy, and who, after paying the real price asked for the land, appropriated the balance to his own use, is guilty of larceny.

J. W. Corcoran, for the defendant.

A. E. Pillsbury, attorney-general, and *C. N. Harris*, second assistant attorney-general, for the commonwealth.

HOLMES, J. The defendant is indicted for the larceny of promissory notes, the property of one Teeling, and has been found guilty. The case is before us on exceptions to the refusal of the court below to rule that the evidence was insufficient to support the indictment, and also to the instructions given to the jury. The evidence tended to prove the following facts: The defendant was an attorney employed by Teeling to ascertain the price of certain land. The price mentioned to him was \$125. He told Teeling that the lowest price was \$325, \$300 to go to the owners of the land, \$15 to Bent, the agent, with whom the defendant communicated, and \$10 to the defendant. Teeling assented to the terms, and gave Bent directions as to the deed. When the deed was ready, Teeling, Bent, and the defendant met. The defendant approved the deed, and said to Teeling, "Pay over the money." Teeling counted out \$325 on the table in front of the defendant, who counted it, took it from the table, and requested Bent to go into the next room. He then gave Bent \$125 of the money, returned to Teeling, gave him a receipt for \$10, and kept the rest of the money. The court instructed the jury "that, upon the evidence, they might find the defendant guilty of larceny if they were satisfied that he had obtained the money of said Teeling by false premeditated trick or device; that although Teeling might have given the manual custody of the money to the defendant, nevertheless the legal possession would remain in Teeling under such circumstances, and the larceny

would be complete when the defendant, after thus getting possession of Teeling's money and inducing him to count out \$190 more than was needed, appropriated it to his own use."

When the defendant took up the money from the table, it had not yet passed under the dominion of Bent, who represented the opposite party. The defendant did not receive it as representing the opposite party; he purported to be acting in the interest of Teeling. The jury would have been warranted in finding that Teeling impliedly authorized the defendant to take up the money from the table, but they only could have found that he allowed him to do so for the purpose of immediately transferring the identical bills, or all but ten dollars of them, to Bent under Teeling's eyes. Subject to a single consideration, to be mentioned later, there is no doubt that in thus receiving the money for a moment the defendant purported at most to act as Teeling's servant or hand, under his immediate direction and control. Therefore not only the title to the money, but the possession of it, remained in Teeling while the money was in the defendant's custody: *Commonwealth v. O'Malley*, 97 Mass. 584. If the defendant had misappropriated the whole sum, or if he misappropriated all that was left after paying Bent, the offense would be larceny: *Commonwealth v. Berry*, 99 Mass. 428; 96 Am. Dec. 767; *Regina v. Cooke*, L. R. 1 C. C. 295; 12 Cox C. C. 10; *Regina v. Thompson*, Leigh & C. 225, 230; 2 East P. C., c. 16, secs. 110, 115. See further, *Commonwealth v. Donahue*, 148 Mass. 529, 530; 12 Am. St. Rep. 591, and cases cited.

The instructions made the defendant's liability conditional upon his having obtained the money from Teeling by a premeditated trick or device. If he did so, and appropriated all that was left after paying Bent, he was guilty of larceny, irrespective of the question whether Teeling retained possession, according to the *dicta* in *Commonwealth v. Barry*, 124 Mass. 325, 327, under the generally accepted doctrine that if a party fraudulently obtains possession of goods from the owner with intent at the time to convert them to his own use, and the owner does not part with the title, the offense is larceny. Even if the possession had passed to the defendant, there can be no question that the title remained in Teeling until the money should be handed to Bent: See note to *Regina v. Thompson*, Leigh & C. 225, 230.

In this case, however, by the terms of his agreement with

Teeling, the defendant had the right to retain \$10 out of the moneys in his hands; and it may be argued that it is impossible to particularize the bills which were stolen, seeing that the defendant appropriated bills to the amount of \$195 all at once, without distinguishing between the \$10 he had a right to select and the \$185 to which he had no right. This argument appears to have troubled some of the English judges in one case, although they avoided resting their decision on that ground: *Regina v. Thompson*, Leigh & C. 233, 236, 238. If the argument be sound, it might cause a failure of justice by the merest technicality. For it easily might happen that there was no false pretense in the case, and that a man who had appropriated a large fund, some small part of which he had a right to take, would escape, unless he could be held guilty of larceny. We think the answer to the argument is this. All the bills belonged to Teeling until the defendant exercised his right to appropriate ten dollars of them to his claim. He could make an appropriation only by selecting specific bills to that amount. He had no property in the whole mass while undivided. If he appropriated the bills as a whole, he stole the whole, and the fact that he might have taken ten dollars does not help him, because he did not take any ten dollars by that title, or in the only way in which he had a right to take it. The later English cases seem to admit that a man may be liable for the larceny of a sovereign given him in payment of a debt for a less amount in expectation of receiving change, as well as in cases like *Commonwealth v. Berry*, 99 Mass. 428, 96 Am. Dec. 767, where there is nothing due the defendant: *Regina v. Gumble*, L. R. 2 C. C. 1; 12 Cox C. C. 248; *Regina v. Bird*, 12 Cox C. C. 257, 260. See further, *Hildebrand v. People*, 56 N. Y. 394; 15 Am. Rep. 438.

Although the point is immaterial to the second ground of liability which we have mentioned, we may add that we are not disposed to think that the fact that the defendant may have been expected to select ten dollars for himself during the moment that the bills were in his hands was sufficient to convert his custody into possession. That right on his part was merely incidental to a different governing object, and it would be importing into a very simple transaction a complexity which does not belong there to interpret it as meaning that the defendant held the bills on his own behalf, with a lien upon them until he could withdraw his pay.

It is not argued that the averment as to promissory notes is not sustained: *Commonwealth v. Jenks*, 138 Mass. 484, 488.

Exceptions overruled.

LARCENY — PROPERTY OBTAINED BY FRAUD. — One to whom personal property is delivered for a special purpose, but who intended when he procured such delivery to appropriate it to his own use, is guilty of larceny: *Soltau v. Gerdau*, 119 N. Y. 380; 16 Am. St. Rep. 843, and note; *State v. Hall*, 76 Iowa, 85; 14 Am. St. Rep. 204, and note; *Grunson v. State*, 89 Ind. 533; 46 Am. Rep. 178, and note; *Smith v. People*, 53 N. Y. 111; 13 Am. Rep. 474; *People v. Dimick*, 107 N. Y. 13. To fraudulently procure the delivery of goods with a felonious intent to convert them is larceny: *People v. Raischke*, 83 Cal. 501.

McGOVERN v. HERN.

[153 MASSACHUSETTS, 303.]

STATUTE OF FRAUDS. — **MEMORANDUM OF SALE** cannot satisfy the statute of frauds, unless it either names the vendors or describes them so that they can be identified by other evidence. Where the sale is at public auction, and the advertisement of sale states that it is to be made "to settle the estate of John Higgins," a memorandum of the sale, made by the auctioneer, neither naming the vendors nor describing them, except to designate them as the "sellers," is fatally defective, though the parties for whom the sale was made were either the devisees of John Higgins or grantees from such devisees.

VENDOR AND PURCHASER. — A contract for the purchase of land is not negotiable, and cannot be enforced by one who acquires title to the land from the vendors after the contract is made.

ACTION to recover damages for breach of an agreement to purchase land. The sale upon which the plaintiff relied was made at public action, and the memorandum of the sale made by the auctioneer was upon a blank form, in one corner of which were the words: "By Sullivan Brothers, Auctioneers, No. 9 School Street," and these words were followed by a copy of the advertisement of sale, copied from a newspaper, stating that the property is to be sold "to settle the estate of John Higgins, deceased," and also by the following statement of the conditions of sale, signed by the purchaser: —

"BOSTON, October 18, 1888.

"Terms and conditions of sale. Cash on delivery of the deed. Conveyance to be made in ten days from date, at the office of Sullivan Brothers, No. 9 School Street, by a good and sufficient deed, or the sellers may take thirty (30) days, if necessary, in order to give title. Taxes for 1888 to be paid by the purchaser; five hundred dollars to be paid into our

hands to bind the sale and form part of the purchase-money in settlement for the estate, but will be forfeited to the seller if the purchaser fails to comply with the terms of sale. Forfeiture of the deposit-money will not release the purchaser from his obligations to take the property; but if the title to the estate shall not be good, this agreement shall be void.

“BOSTON, October 18, 1888.

“I am the purchaser of the estate described in the printed advertisement hereto affixed, for the sum of twenty thousand six hundred and fifty (\$20,650) dollars, and hereby assent to the terms of sale, and agree to abide by the same.”

The property sold was owned by the devisees of John Higgins, deceased, and by their grantees, and the owners, after the sale and before the tender of the deed, made a conveyance to the plaintiff. The trial court ruled in favor of the defendant on both the grounds mentioned in the opinion of the appellate court, and the plaintiff excepted.

C. F. Donnelly, for the plaintiff.

D. E. Ware, for the defendant.

C. ALLEN, J. The memorandum of the sale is insufficient to satisfy the statute of frauds. It is essential that it should show who are the vendors. It is true that they need not be named. It is enough if they are described, and in that case parol evidence is admissible to apply the description and to identify the persons meant: *Jones v. Dow*, 142 Mass. 130, 140; *Catling v. King*, L. R. 5 Ch. Div. 660; *Rossiter v. Miller*, L. R. 3 App. Cas. 1124, 1141; L. R. 5 Ch. Div. 648. Merely to refer to the persons selling as the vendors is no description: *Catling v. King*, L. R. 5 Ch. Div. 660, 665, per Mellish, L. J. In *Gowan v. Klous*, 101 Mass. 449, the sellers were described as “Eveline Gowan, guardian, and the heirs of Thomas Gowan”; and it was held that one of the heirs, who owned the lot in question, might maintain the action. The court said: “It is no objection to the sufficiency of the memorandum, that the seller therein named is but an agent of the real owner; and on proof of the agency, the latter may sue or be sued on the contract made by his agent in his behalf.” The trouble with the memorandum in the case before us is, that the seller is neither named nor described. Sullivan Brothers were indicated in one corner of the paper as the auctioneers, and it cannot fairly be considered that they were anything else. Their

function as auctioneers was recognized in the memorandum as something distinct from that of parties contracting for unmentioned principals: *Grafton v. Cummings*, 99 U. S. 100, 107, 108.

There is another objection which is fatal to the action in the present form, though it might perhaps be cured by an amendment substituting the proper plaintiffs for the present plaintiff. At the time of the sale, it appears that the estate was owned by devisees of John Higgins, and by grantees of certain of the devisees. The plaintiff was not at that time interested in the estate, but acquired it afterwards for the purpose of conveying it. If anybody had contracted as vendor, then it would be sufficient if such person was able to give a good title at the time specified: *Dresel v. Jordan*, 104 Mass. 407. In that case it was held that the person who contracted to sell, and who was described in the memorandum, might maintain an action. But such a contract is not negotiable, and it could not be said that the purchaser is liable to a suit in the name of a person who subsequently acquires the title of those who were the owners at the time of the sale: *Grafton v. Cummings*, 99 U. S. 100.

Exceptions overruled.

THE PRINCIPAL CASE WAS FOLLOWED IN THE CASE OF *Lewis v. Wood*, 153 Mass. 321. The memorandum relied upon in that case was a letter written by Mrs. Hawes, with the assent of the defendant, and was as follows:—

“EAST WEYMOUTH, March 24, 1890.

“Dear Sir,— My sister and I have decided to accept the offer of \$1,450 for our interest in the Cambridge property now under discussion. I think, however, I would better see you this evening or next, between six and seven, if convenient.

Respectfully, E. C. HAWES.”

The writer of the letter and the defendant each owned an undivided seventh of certain land in Cambridge, and there had been some discussion by the writer, on behalf of herself and defendant, with one Pratt, who was acting as their agent, regarding the sale of their respective interests, and he had communicated to them an offer of purchase made by him, but had not stated at any time who the proposed purchaser was. After the offer was made, the letter above referred to was written. Afterwards, a bill in equity was brought by one Lewis for the specific performance of the agreement to sell the defendant's interest in the land. The memorandum above referred to, being relied upon at the trial, was ruled out, and in sustaining this ruling, the supreme court said: “Without considering all the objections that can be urged against the memorandum, it is sufficient to say that it is materially defective in not containing the name of the purchaser, or any designation of him whatever. In order to satisfy the statute, the memorandum should not only have been signed by the defendant or her authorized agent, and have identified the property to be sold, but should also have contained the name

of the other party to the contract, or should have described him with reasonable certainty."

STATUTE OF FRAUDS — SUFFICIENCY OF MEMORANDUM. — A memorandum of a sale of real estate which does not name nor describe the vendor is fatally defective: *Mentz v. Newwitter*, 122 N. Y. 491; 19 Am. St. Rep. 514, and note; *Sherburne v. Shaw*, 1 N. H. 157; 8 Am. Dec. 47.

BILLINGS v. MARSH.

[153 MASSACHUSETTS, 311.]

TRUSTS — INTERESTS WHICH DO NOT PASS TO ASSIGNEE IN INSOLVENCY. — If property is devised or bequeathed to a trustee, to hold in trust for the benefit of the testator's daughter, in a will which declares that no part of the property "shall, before the payment, or conveyance, or transfer thereof to such child, be assignable, or attachable, or trusteeable, or in any way or manner liable for, or liable to be taken for, any debt, liability, or contract of such child, or be applied in any way or manner to the payment thereof," the interest of the beneficiary does not pass to and is not recoverable by her assignee in insolvency, under the statute which provides that a conveyance shall be made to him which shall "convey to the assignee all the estate, real and personal, of the debtor, except such as is by law exempt from attachment."

L. L. Scaife and B. G. Davis, for the plaintiff.

J. D. Ball, for the defendants.

HOLMES, J. This is a bill in equity by an assignee in insolvency, seeking to recover property alleged to have passed to him by the assignment. The defendants are trustees under the will of Charles Marsh, who hold the property in question under that will, in trust for the insolvent, who is Mr. Marsh's daughter, during her life. There are several distinct funds, but they are all equitable life estates, and are all held subject to the fourteenth article of the will, which provides that no part of the property "shall, before the payment, or conveyance, or transfer thereof to such child, . . . be assignable, or attachable, or trusteeable, or in any way or manner liable for, or liable to be taken for, any debt, liability, or contract of such child, . . . or be applied in any way or manner to the payment thereof." The question is, whether this provision prevented the property from passing to the plaintiff.

The plaintiff's counsel admit that if the insolvent had attempted to alienate her interest, or if a single creditor had attempted to reach it in payment of his debt, the attempt would have failed, under *Broadway Nat. Bank v. Adams*, 133 Mass. 170; 43 Am. Rep. 504. But they say, very truly, that

when a testator or a grantor attempts to attach to property an incident which the law does not allow to be attached to it, that attempt also must fail, no matter how clearly he may express his intention; and they argue that, whatever may be the policy of the law, in the absence of statute, the insolvent law transfers all the insolvent's property to the assignee; that this is property of the insolvent, and therefore that it passes, whether the testator purported to allow or forbid the transfer.

We cannot construe the insolvent law so broadly as is necessary for the plaintiff's argument. It is true that by the Public Statutes, c. 157, sec. 44, the judge shall "convey to the assignee all the estate, real and personal, of the debtor, except such as is by law exempt from attachment"; but section 46 goes on to specify what the assignment shall vest in the assignee. The plaintiff says that section 46 does not limit, but extends, section 44. We think the contrary apparent on the face of the statutes as they now read. The form of the assignment is directed by section 44; its effect is detailed in section 46. But if there were any doubt on the question, it is answered by going back to the original act. In the Statutes of 1838, c. 163, the sections 44 and 46 will be found substantially as they now are; but in a single section (sec. 5), what is now section 46, following section 44, and introduced by the words "which assignment shall vest," etc. In this form, there can be no question that the words of section 46 alone determined what the assignment should vest in the assignee. The compilers of the General Statutes, without remark, and merely as a matter of arrangement, separated the two parts, and put another section between them: Gen. Stats., c. 118, secs. 42, 44.

It is not contended that section 46, taken by itself, would include the property in question. This is not property which the debtor "could have lawfully sold, assigned, or conveyed, or which might have been taken on execution upon a judgment against him," or a debt due to the debtor, or a right of action for goods or estate, real or personal.

However liberally section 46 may have been construed, it is to be remembered that it does not cover all valuable rights of the insolvent; for instance, a right of action for personal injury: *Stone v. Boston etc. R. R. Co.*, 7 Gray, 539; and see Gen. Stats., sec. 51; although it is going pretty far to say that such a right is not property: See *Bassett v. Parsons*, 140 Mass. 169, 170; *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126,

128. It is to be observed, also, that the statute touching bills in equity, to reach and apply "any property" of a debtor which could not be taken on execution, afforded about as strong an argument for the plaintiff in *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504, as the insolvent law does in this case: Pub. Stats., c. 151, sec. 2, cl. 11. The argument has been strengthened by the statute of 1884, c. 285, sec. 1, but no one has ventured to suggest that *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504, is not still the law, and it has been, and undoubtedly will be, followed in cases since the later act: *Baker v. Brown*, 146 Mass. 369; *Maynard v. Cleaves*, 149 Mass. 307, 309; *Slattery v. Wason*, 151 Mass. 266; 21 Am. St. Rep. 448. See further, *Nichols v. Eaton*, 91 U. S. 716; *Durant v. Massachusetts Hospital Ins. Co.*, 2 Low. 575.

Bill dismissed.

TRUSTS — EXEMPTING BEQUESTS OR DEVISES FROM LIABILITY FOR DEBTS.

— If a testator leaves by will property in trust for the benefit of his brother, the profits thereof to be for his use, and declares that neither the property nor profits shall be bound for his past or future debts, such profits cannot be aliened or assigned by him, nor reached by creditor's bill against him: *Garland v. Garland*, 87 Va. 758; 24 Am. St. Rep. 682, and extended note; *Slattery v. Wason*, 151 Mass. 266; 21 Am. St. Rep. 448, and note; *Smith v. Towers*, 69 Md. 77; 9 Am. St. Rep. 398, and note 405-408.

MCCARTHY v. SUPREME LODGE NEW ENGLAND ORDER OF PROTECTION.

[153 MASSACHUSETTS, 314.]

BENEFICIAL ASSOCIATION — BENEFICIARY, WHO MAY BE. — Under a statute authorizing the organization of corporations for the purpose of assisting the widows, orphans, and other relatives of deceased members, or any persons dependent upon deceased members, one may be made a beneficiary who is neither a widow, orphan, or other relative of the member, if wholly or partly dependent upon him for support.

BENEFICIAL ASSOCIATIONS — DEPENDENTS, WHO ARE NOT. — A beneficiary must be dependent upon a member in a material degree for support, maintenance, or assistance, and the obligation on the part of the member to furnish it must rest upon some moral, legal, or equitable ground, and not upon the purely voluntary or charitable impulses of the member.

BENEFICIAL ASSOCIATIONS — DEPENDENT, WHO IS. — **ONE ENGAGED TO BE MARRIED TO A MEMBER**, to whose support he contributes weekly, under an agreement so to do, a material sum, which is necessary for her comfortable support, is a dependent, within the meaning of the statute controlling beneficial associations, where the contribution is made and

accepted on account of the engagement of marriage, and the agreement to make it was induced by her leaving, at his request, an employment in which she was receiving more wages than she could get in the new employment into which she entered. The fact that she could have returned to her old employment, and thereby have supported herself as she had been accustomed to do before leaving, and that since the death of her *fiancée* she had supported herself, cannot affect her *status* at the time of his death and at the time the certificate was taken out.

BENEFICIAL ASSOCIATION — DEPENDENT, CEASING TO BE. — The *fiancée* of a member on whom she is dependent for support does not cease to be such dependent on account of their having had a lovers' quarrel, and his feelings having become for a time alienated from her, if, up to the time of his death, their engagement had not been broken, and she expected to meet him again, and make up their quarrel, and there is nothing to show that he had intended to contribute no longer to her support, or that she understood that she was not to depend on him any longer.

BENEFICIAL ASSOCIATIONS. — CHANGE OF BENEFICIARY cannot be made by the will of a member when the by-laws of the association point out a mode in which such changes can be made, and that mode was not adopted.

BILL in equity by the parents of John J. McCarthy, deceased, against the Supreme Lodge New England Order of Protection, Sarah J. Judge, and Margaret Quirk, to obtain the proceeds of a certificate of membership issued to said John J. McCarthy. Margaret Quirk was his sister and executrix, and Sarah J. Judge was his *fiancée*. The certificate issued to John J. McCarthy in March, 1889, and was made payable to "Sarah J. Judge, *fiancée*," and he took none of the steps required by the by-laws to change the beneficiary. Some months before the certificate was issued, McCarthy and Miss Judge had agreed to marry. She was a table-girl at the Norfolk House, Boston, receiving for her services twelve dollars per month and her room and board. He wished her to change her employment because it was confining, and he could not see her as often as he desired, and he told her that if she would make a change he would supply her with such sums as, with what she could earn elsewhere, would give her a comfortable support. She did as requested, and obtained employment where her wages were much less than at the Norfolk House, and were not adequate to her comfortable support, and he, each week, contributed to her sums varying from two dollars to five dollars, making his last contribution four days before his death. The certificate was delivered to Miss Judge on the day of its issuance, and she retained it until the day of his death, at which time she delivered it to a messenger, who stated that McCarthy had sent for it. On the same day

he made a will, appointing his sister, Mrs. Quirk, executrix, and expressing a wish that the moneys here in controversy be paid to his mother and sister. The by-laws of the corporation had, however, provided a mode in which changes of beneficiary should be made, the clause upon that subject being as follows: "Sec. 3. A member may, at any time, when in good standing, surrender his or her benefit certificate, and a new certificate shall thereafter be issued, payable to such beneficiary or beneficiaries dependent upon him or her, or to any person or persons as such member may direct, upon the payment of a certificate fee of one dollar. Said surrender and direction must be on the prescribed form, furnished by the supreme secretary, signed by the member before the warden, secretary, and treasurer, and witnessed by them, and forwarded under seal of the subordinate lodge, with the benefit certificate to the supreme secretary." The judge reported the case for the consideration of the court.

J. A. McGeough, for the plaintiffs.

E. Avery and P. Webster, for Sarah J. Judge.

MORTON, J. The Public Statutes, c. 115, sec. 8, as amended by the Statutes of 1882, c. 195, sec. 2, which were in force at the time the defendant corporation was organized, provide that "a corporation organized for any purpose mentioned in section 2 may, for the purpose of assisting the widows, orphans, or other relatives of deceased members, or any persons dependent upon deceased members, provide in its by-laws for the payment by each member of a fixed sum, to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto." It is evident from the language here used that while widows, orphans, or other relatives may be "persons dependent upon" a deceased member, it is within the contemplation of the statute that a person may be dependent upon a deceased member who is not a widow, or orphan, or relative of such member, and that it is one of the objects of the statute to provide that such persons may share in the benefits of the association which may be organized under it. The purpose seems to have been to provide that "widows, orphans, or other relatives," whether dependent or not, might be designated as beneficiaries, and that any other person who is dependent upon a member, although not a widow, or orphan, or other relative, may also be designated by him as a beneficiary:

Stats. 1877, c. 204, sec. 1; Pub. Stats., c. 115, sec. 8; Stats. 1882, c. 195, sec. 2; Stats. 1888, c. 429, sec. 8. Nor is there anything in the statute which requires that the dependent person should be legally or wholly dependent upon a member. On the contrary, the enumeration of the classes of persons who would be legally dependent upon a member, followed by a phrase distinctly intended to include other persons, would seem to establish conclusively that legal dependency was not the test. Nor can it be justly said that if the beneficiary is dependent in part, he or she is not dependent. Cases will readily occur to one in which persons are partly supported or partially assisted by others. It would be giving an unnecessarily harsh construction to a statute which the court has said should be construed "liberally, and in such a manner as to carry out the benevolent purpose sought to be provided for," to hold that such cases were excluded from it: *American Legion of Honor v. Perry*, 140 Mass. 580, 589.

Trivial or casual, or perhaps wholly charitable, assistance would not create a relation of dependency, within the meaning of the statute or by-laws. Something more is undoubtedly required. The beneficiary must be dependent upon the member in a material degree for support, or maintenance, or assistance, and the obligation on the part of the member to furnish it must, it would seem, rest upon some moral, or legal, or equitable grounds, and not upon the purely voluntary or charitable impulses or disposition of the member: *American Legion of Honor v. Perry*, 140 Mass. 580; *Ballou v. Gile*, 50 Wis. 614; Bacon on Benefit Societies, sec. 261.

Applying these considerations to the case before us, we think it is clear that Miss Judge was dependent upon McCarthy, within the meaning of the statute and of the by-laws of the corporation, both at the time when the certificate was taken out and at the time of his death. From October, 1888, up to the time of his death, in August, 1889, she received from him weekly from two to five dollars towards her support, in addition to her own wages, which averaged during the same time \$4.38 per week. The sums which she thus received from him contributed in a material degree to her maintenance. The chief justice who heard the case found as a fact that what she earned at Fleming's per week "was less than she had been accustomed to earn as a table-girl, and less than she could live on as she had been accustomed to live, and less than she could comfortably live on, and that the contributions of

money by Mr. McCarthy while she was working at Fleming's were reasonably necessary for her comfortable support during that time." He also found that McCarthy's "promise to give her money was understood by both to have been made and accepted because they were engaged to each other," though "neither regarded it as an independent contract"; that "she was under no obligation to remain at Fleming's longer than she wished"; and that "she would not have accepted money from him, and he would not have given it, if they had not been engaged," and the arrangement was made with "her as his intended wife, and was understood to be conditional and dependent upon that relation." The fact that Miss Judge was the affianced wife of McCarthy would not as matter of law constitute her a dependent upon him: *American Legion of Honor v. Perry*, 140 Mass. 580; and the statute of 1890, c. 341, was not passed till after the certificate was issued, and therefore does not apply. It is questionable, too, whether McCarthy's promise to contribute to her support could have been legally enforced by her. But we think, in view of the relation between them, she had a right to receive and depend on his assistance, and that he was under a moral obligation, after promising it, to continue to furnish it. She in fact depended on it, and was aided by it for many months, and down to his death. The money was not given by him, nor received by her, as a charity, but was given to and received by her as his intended wife,—as a person who, in some sort, had a claim upon him; and whatever his legal rights may have been, it plainly was not expected by either, that, so long as the relation between them continued, his assistance would be refused or withheld; and so her dependence on him had a certain quality of permanency, and was not casual or merely temporary. The fact that she could have gone back to her employment as table-girl, and have supported herself as she had been accustomed to do before going to work at Fleming's, and the fact that since McCarthy's death she has supported herself, cannot affect her *status* at the time of his death, and at the time when the certificate was taken out.

If her situation since McCarthy's death, or at the time of the trial, is material, it would seem to be disposed of by the finding of the chief justice that "the money payable under the policy would enable her to live much more comfortably than she can without it." To assist dependent persons to live more comfortably after the death of a member is clearly

one of the purposes for which a benefit certificate may be issued.

It is objected that at the time of McCarthy's death she had ceased to be dependent upon him. But although there had been some difference between them, "probably a lovers' quarrel" it is said, and his feelings had for the time being become alienated from her, it is expressly found that up to the time when he died, he had not absolutely decided to break the engagement, and that the engagement was not broken while he lived. He gave her two dollars on the Monday night before he died, and she expected to meet him again and make up whatever quarrel they had had, and "did not understand that the engagement had been broken, or that he had made up his mind to break it." Nor does it appear, nor can we infer, that he intended not to contribute any longer to her support, or that she understood that she was not to depend on him any longer. Under these circumstances, we cannot say that the relation of dependency had ceased at the time of his death.

It is also urged, that upon grounds of public policy Miss Judge is not entitled to the fund. But it was admitted at the argument, on all hands, that the relations between the two were entirely proper, and we fail to see anything contrary to good morals or public policy in her claim to the fund.

The attempt of McCarthy to dispose of the fund by will, and to revoke the designation of Miss Judge as the beneficiary under the certificate, was wholly ineffectual. The by-laws of the defendant corporation pointed out the mode in which the beneficiary was to be changed, if at all, and that mode was not followed. Another beneficiary could be substituted only in the manner there provided: *Elsey v. Odd Fellows' Mut. Relief Ass'n*, 142 Mass. 224; *Daniels v. Pratt*, 143 Mass. 216.

We think, therefore, that Sarah J. Judge, the person named in the certificate, is entitled to the fund.

Decree for Sarah J. Judge.

MUTUAL BENEFIT ASSOCIATIONS — WHO MAY BE BENEFICIARIES. — If a corporation is organized under a statute authorizing the formation of associations for the accumulation of funds for widows and children of deceased members, the association can pay such fund only to such persons; but in case the insured shall have made no disposition of the benefit, it shall be paid to those dependent upon him at the time of his death: *Britton v. Supreme Council etc.*, 46 N. J. Eq. 102; 19 Am. St. Rep. 376, and note. One may be a beneficiary where such relationship exists between himself and the assured that there exists some reasonable expectation of advantage to him from the

continuance of the life of the assured: *Keystone etc. Ass'n v. Norris*, 115 Pa. St. 446; 2 Am. St. Rep. 572, and note.

INSURABLE INTEREST OF FIANCÉE. — A woman engaged to be married to a man has an insurable interest in his life: *Chisholm v. National etc. Ins. Co.*, 52 Mo. 213; 14 Am. Rep. 414; see note to *Morrell v. Trenton etc. Ins. Co.*, 10 Cush. 282; 57 Am. Dec. 101.

MUTUAL BENEFIT ASSOCIATIONS — DESIGNATION OF BENEFICIARY. — Beneficiaries in mutual benefit associations must be designated according to the rules and by-laws of the association: *Union Mut. Ass'n v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519, and note. See note to *Bankers' etc. Ass'n v. Stapp*, 19 Am. St. Rep. 786-790.

JACKSON v. JACKSON.

[168 MASSACHUSETTS, 374.]

WILLS — CONSTRUCTION OF THE WORD "ISSUE." — If a bequest is made of a sum of money to S. for her life, and at her death to her husband, if then living, and if not, to her issue, and she survives him, leaving children and grandchildren, the fund, on her death, vests in her children then living, and the descendants of her deceased children *per stirpes*; neither the administrator of her deceased child, nor the children of any of her children then living, has any interest therein.

F. C. Lowell, for the plaintiffs.

J. L. Thorndike, for Charles C. Jackson.

J. C. Gray, for the children of Charles C. Jackson.

W. R. Trask and R. F. Simes, for the administrator of Susan C. Folsom.

FIELD, C. J. This is a bill for instructions, brought by the trustees under the will of Charles Jackson, which, with two codicils, was duly proved in the probate court for the county of Suffolk on January 14, 1856. Susan C. Jackson, the wife of Charles Jackson, the son of the testator, died on April 1, 1890, having survived her husband, and leaving issue surviving her as follows: Charles C. Jackson and Frank Jackson, her sons; Marian Jackson, her daughter; Amy Folsom, daughter of Susan C. Folsom, a deceased daughter of said Susan C. Jackson; and five children of said Charles C. Jackson, namely, Charles Jackson, Robert A. Jackson, Susan Jackson, George S. Jackson, and Frances A. Jackson. Susan C. Folsom died intestate on June 27, 1871, and the administrator of her estate has been made a defendant. Susan C. Jackson never had any issue living after the death of the testator except

those above named, and Susan C. Folsom never had any issue except said Amy Folsom.

The question is as to the distribution to be made of the ten thousand dollars given in trust by the fourth article of the will, the income of which was payable to Susan C. Jackson during her life. Charles C. Jackson, Frank Jackson, Marian Jackson, and Amy Folsom contend that the fund should be paid to them in equal shares, one fourth to each. The five children of Charles C. Jackson contend that it should be paid to them and to the four persons just named in the preceding sentence, concurrently, in equal shares, one ninth to each. The administrator of the estate of Susan C. Folsom contends that Susan C. Folsom took a vested interest in the fund as of the death of the testator, and that he, as her personal representative, is entitled to one fourth of the fund, or if this is not so, and if all the issue are to take *per capita*, that then he, as administrator, is entitled to one tenth of the fund. The clause of the fourth article of the will, the construction of which is in controversy, after a gift to the testator's son, Charles Jackson, proceeds as follows: "And I give to his said wife, Susan, for her life, the sum of ten thousand dollars, to be put in trust, and to be so secured as not to be liable for the debts of her husband, and so that she shall receive the income thereof to her sole and separate use during her life; and at her death the said ten thousand dollars shall be paid to her said husband, if then living, and if not, to her issue. And if she should survive her said husband, and should leave no issue, I give this ten thousand dollars at her death to all my children then living, and the issue of any deceased child; such issue to take as by right of representation the shares of their respective parents."

We think that this clause means that on the death of Susan C. Jackson the ten thousand dollars shall be paid to her husband, if then living, or if not, to her issue then living, and that if on her death she should leave neither husband nor any issue then living, the ten thousand dollars shall be paid to all the children of the testator then living, and to the issue of any deceased child, "such issue to take as by right of representation the shares of their respective parents." The provision that if Susan C. Jackson "should survive her said husband, and should leave no issue," means leave no issue living at her death; and, taken in connection with the preceding clause, the meaning is, that if she survive her husband,

and leave issue living at her death, the ten thousand dollars shall be paid to such issue, — that is, to the issue living at her death. The interest of **such** issue, therefore, is contingent until her death.

There may be some doubt whether, grammatically, the last clause, namely, "such issue to take as by right of representation the shares of their respective parents," qualifies only the clause which gives the property to the issue of the deceased children of the testator, or qualifies that and the clause which gives it to the issue of Susan C. Jackson; but we do not think it necessary to determine this.

In *King v. Savage*, 121 Mass. 303, the question was, "whether Henry Savage was entitled to receive the entire principal of his father's share, to the exclusion of his children," or whether he and his children should take *per capita*. By a codicil, property had been given in trust to pay the income to Samuel Phillips Savage, the father of Henry Savage, during his life, and upon his decease the principal was to be divided among the issue of Samuel Phillips Savage, and if he left no issue, then among his heirs at law. In other bequests in the will there were provisions that the children of the life tenants on their death should take the principal in equal shares, "the issue of any deceased child to take the share of their deceased parent." It is said in the opinion, that, in the connection in which the word "issue" is used in the last clause quoted, it "would be limited to children," and *Sibley v. Perry*, 7 Ves. 522, and *Pruen v. Osborne*, 11 Sim. 132, are cited. The decision was, that the word "issue," in the codicil, should be limited to children, as it would be in other provisions of the will, and that therefore the issue of living children should be excluded. But if the word "issue" had been construed to mean descendants taking *per stirpes*, the same result would have been reached.

In *Ralph v. Carrick*, L. R. 11 Ch. Div. 873, Lord Justice James said: "It is, however, I think, settled, but rather by the case of *Pruen v. Osborne*, 11 Sim. 132, than by *Sibley v. Perry*, 7 Ves. 522, that, as a general rule, when you find a gift to a person and then a gift to the issue of that person, such issue to take only the parent's share, the word 'issue' is cut down to mean children," and he proceeds to point out some of the hard consequences of that rule. Lord Justice Brett said: "After hearing what the effect of such a general rule may be as described by Lord Justice James, I should have no objec-

tion to be present at the funeral of *Sibley v. Perry*, 7 Ves. 522."

In the case at bar, the word "issue" in the first part of the clause is not used in immediate connection with the word "parent," and in other corresponding provisions of the will and of the first codicil, where property is given to "issue" on the death of their parent, it is sometimes expressed that the issue shall take their parent's share by right of representation, and sometimes the gift is simply to issue without any qualification. Although in England, when the word "issue" is used as the correlative of parent, it is held that the word "parent" means father and mother, and that the word "issue" means children, yet there, as well as here, the usual legal meaning of the word "issue" is, all lineal descendants. This is also the popular meaning in this commonwealth: *Martin v. Holgate*, L. R. 1 H. L. 175; *Freeman v. Parsley*, 3 Ves. 421; *Weldon v. Hoyland*, 4 De Gex, F. & J. 564; *Bigelow v. Morong*, 103 Mass. 287; *Hills v. Barnard*, 152 Mass. 67. We think that, as a matter of verbal construction, it would be as easy and natural to say that where the words "parents" and "issue" are used in connection with each other, the word "parents" means ancestors, as that the word "issue" means children; and in the construction of any instrument it is always necessary to look beyond the literal meaning of words.

The English decisions are collected in 2 Bigelow's *Jarman on Wills*, 101-107. They do not seem to be wholly satisfactory even to the English judges, and in *Hills v. Barnard*, 152 Mass. 67, we refused to follow the decision in *Martin v. Holgate*, L. R. 1 H. L. 175, in a case closely resembling that, and reached a conclusion analogous to that of the court of appeals in *Ralph v. Carrick*, L. R. 11 Ch. Div. 873. The tendency of our decisions has been more and more to construe "issue," where its meaning is unrestricted by the context, as including all lineal descendants and importing representation, and certainly when the issue take as of a particular time after the death of the testator, and only the issue living at that time take, the issue of deceased issue take by a sort of substitution for their ancestors. The present is not a case where the issue take as of the death of the testator, or where by the terms of the will issue take share and share alike: *Hills v. Barnard*, 152 Mass. 67; *Dexter v. Inches*, 147 Mass. 324, 325; *Hall v. Hall*, 140 Mass. 267.

We are of opinion that when by a will personal property is

given in trust to pay the income to a person during life, and on the death of such person to pay the principal sum to his issue then living, it is to be presumed that the intention was, that the issue should include all lineal descendants, and that they should take *per stirpes*, unless from some other language of the will a contrary intention appears.

The result is, that Charles C. Jackson, Frank Jackson, Marian Jackson, and Amy Folsom are entitled to the principal of the trust fund in equal shares.

Decree accordingly.

WILLS — CONSTRUCTION OF THE WORD "ISSUE." — A devise "to the male issue then living of testator's son" includes all male lineal descendants of that son then living, whether of the same generation or not: *Wistar v. Scott*, 105 Pa. St. 200; 51 Am. Rep. 197. The issue of any deceased legatee must be meant to mean descendants taking by right of representation: *Hills v. Barnard*, 152 Mass. 67.

COMMONWEALTH v. STEVENS.

[153 MASSACHUSETTS, 421.]

MASTER AND SERVANT. — MASTER IS NOT CRIMINALLY RESPONSIBLE for the sale, by his servant, of liquor to a minor, if he had instructed all of his servants not to make any sales to minors, nor to persons under twenty-five years of age, but had left his servants to determine the question of minority from the appearance of customers applying for liquors, and one of his clerks had made an innocent mistake in judging of a customer's appearance. It cannot be affirmed as a matter of law that the test of appearance is unreasonable. Whether it was or not, and whether its imposition indicated bad faith or negligence, the jury should be left to determine.

MASTER AND SERVANT. — MASTER IS NOT ORDINARILY RESPONSIBLE CRIMINALLY for the act of his servant or agent, unless he has in some way participated, or countenanced or approved it.

F. W. Qua and W. F. Courtney, for the defendant.

A. E. Pillsbury, attorney-general, and *C. N. Harris*, second assistant attorney-general, for the commonwealth.

C. ALLEN, J. The defendant was a druggist, and was authorized by his license to sell intoxicating liquors for certain purposes, but not to minors. One of his clerks made a sale to a minor, and the principal question at the trial was, whether the defendant was criminally responsible therefor. There was evidence that he had instructed all of his clerks not to make sales to minors, nor indeed to any person under twenty-five years of age. The learned judge before whom the

case was tried instructed the jury that if they were satisfied that these instructions were given by the defendant, but that the clerks were to determine the question of minority simply from the appearance of the customer, and that the defendant authorized and permitted them to sell without further inquiry if they believed such person to be twenty-five years of age or upwards, and that the clerk who made the sale in this case applied this test, and in good faith sold to this customer, then the defendant would be liable, even if he had no personal knowledge of this sale, because the servant in such case was carrying on the defendant's business in the way he directed, and obeying his instructions; and that, under such circumstances, the act of the servant would be the act of the master. The correctness of this instruction is the principal question before us.

The question in this precise form has not before arisen, so far as we know. In several cases there has been a consideration of the inferences of agency in making a particular sale, which may be drawn from a general employment to sell liquors in the defendant's place of business, and the effect of such employment in overcoming evidence tending to show that the defendant instructed his servant not to sell to minors, or in leading to the conclusion that such instruction, if given, was not given in good faith. But in these cases the question is not discussed whether the master would be criminally responsible for a sale made by a clerk to a minor by mistake, under the supposition that the minor was an adult, both master and servant intending in good faith that no sale should be made to a minor: *Commonwealth v. Hayes*, 145 Mass. 289; *Commonwealth v. Houle*, 147 Mass. 380; *Commonwealth v. Rooks*, 150 Mass. 59.

In the case now before us, it was ruled that criminal responsibility on the part of the master exists in a case where the clerks were expected to determine the question of minority simply from the appearance of the customer; but we cannot see that this particular method of determining the question of minority has any legal significance, except as bearing upon the good faith of the master or of the servant. If the clerks had been instructed not to be satisfied with the personal appearance of the customer, but in all cases to put a direct inquiry as to his age, or even to require further evidence, mistakes might nevertheless be made, although in such cases the clerks would still be carrying on the master's business in

the way prescribed by the master. If the clerks are permitted to be satisfied with a slight test, this indeed would be a proper subject for consideration in determining whether the instructions not to sell to minors were given and acted upon in good faith. But in the present case the instructions to the jury allowed them to convict the defendant, even though the jury should find that he had in good faith given instructions not to sell to minors, and though the clerk in good faith endeavored and intended to follow those instructions, but had innocently made a mistake in judging of the purchaser's age from her appearance. The question was not submitted to the jury to determine, as a matter of fact, whether the permitted mode of determining the age was a reasonable one or not, or whether it indicated bad faith or negligence on the part of the defendant in the mode of conducting his business. That might have been proper for their consideration, but it cannot be affirmed as matter of law that the test was unreasonable, or that it indicated bad faith or negligence. The court cannot lay it down as a rule for the guidance of the jury that the master ought to require further evidence. In many cases, perhaps in most, a mere inspection of the purchaser might be sufficient: *Commonwealth v. Emmons*, 98 Mass. 6.

While a broader rule prevails in respect to a master's civil responsibility for the acts of his servant or agent, ordinarily he is not held responsible criminally unless he in some way participates in, countenances, or approves the criminal act of his servant. Ordinarily, if a servant does a criminal act in opposition to the master's will, and against his orders, though by mistake, the master cannot be held criminally responsible. This rule is of general application, though subject to some real or apparent exceptions: *Commonwealth v. Nichols*, 10 Met. 259; 43 Am. Dec. 432; *Commonwealth v. Wachendorf*, 141 Mass. 270; *Commonwealth v. Briant*, 142 Mass. 463; 56 Am. Rep. 707; *Commonwealth v. Stevenson*, 142 Mass. 466; *Commonwealth v. Hayes*, 145 Mass. 289, 295; *State v. Smith*, 10 R. I. 258; *Anderson v. State*, 22 Ohio St. 305. This rule has been held applicable to cases of sales to drunkards and slaves: *Barnes v. State*, 19 Conn. 398; *State v. Dawson*, 2 Bay, 360; *Hipp v. State*, 5 Blackf. 149; 33 Am. Dec. 463. The case of *Commonwealth v. Uhrig*, 138 Mass. 492, does not go so far as to hold that one may be convicted of an illegal sale for the unauthorized act of his servant, but only that after such sale by his servant he may be convicted of keep-

ing a liquor nuisance. This, of course, is because he is responsible for the character of the place kept by him. But even in respect to this doctrine, it is necessary to bear in mind the limitations indicated by other decisions: *Commonwealth v. Patterson*, 138 Mass. 498; *Commonwealth v. Hayes*, 150 Mass. 506; *Commonwealth v. Hayden*, 150 Mass. 332.

There are some criminal and some penal cases which perhaps may be deemed to be exceptions to the general rule. The usual illustrations are indictments for libel or nuisance, and informations and complaints for the breach of statutory regulations for securing public order; and it is obvious that in some of these instances criminal responsibility is imposed for carelessness or negligence on the part of the master. In *Commonwealth v. Morgan*, 107 Mass. 199, 203, which was an indictment for libel, this court said: "Criminal responsibility on the part of the principal for the act of his agent or servant in the course of his employment implies some degree of moral guilt or delinquency, manifested either by direct participation in or assent to the act, or by want of proper care and oversight, or other negligence in reference to the business which he has thus intrusted to another." See also *Queen v. Holbrook*, L. R. 3 Q. B. D. 60, and L. R. 4 Q. B. D. 42, involving a construction of the English statute respecting libel. Several English cases of informations for penalties are collected in *Smith on Master and Servant*, 4th ed., 312 et seq., which have the appearance of trenching somewhat upon the general rule, unless fairly distinguishable upon the ground there stated, that they partake more of the nature of civil proceedings to recover a debt due to the crown. For a case of public nuisance, where the master was held criminally responsible for his servant's acts, see *Queen v. Stephens*, L. R. 1 Q. B. 702.

Without dwelling upon cases like these further than merely to show that they have not been overlooked, it does not appear to us necessary or reasonable to extend criminal responsibility for the act of a servant so far as to include a case like the present. The servant himself is no doubt responsible, because he has made a sale, however innocently, which the law forbade him to make. But if he reasonably and honestly believed the purchaser to be of adult age, and that the sale might lawfully be made, his statutory guilt should not be imputed to the defendant. Though the defendant would have been responsible for his own mistake, if the sale to the minor had been made by him, it seems to us to be carrying

the doctrine of criminal responsibility for the act of another quite too far to convict him by reason of an honest mistake on the part of his clerk, provided the jury should find that the master sincerely and honestly intended that his instructions should be followed in good faith, and that he was not negligent or careless in the selection of his clerks, or in the regulations and precautions which he prescribed for their guidance: See *Mullins v. Collins*, L. R. 9 Q. B. 292, per Quain, J., and also per Blackburn, J.

The testimony of Palmer as to the number of sales of intoxicating liquors registered on the defendant's books within a fortnight of the alleged sale was competent to be considered, as bearing upon the question of the reasonableness of the precautions taken by the defendant to prevent sales to minors.

Exceptions sustained.

MASTER AND SERVANT — CRIMINAL LIABILITY OF MASTER FOR ACTS OF SERVANT. — A master is not punishable criminally for the offenses of his servant, unless they were committed by his command or with his assent: *Hipp v. State*, 2 Blackf. 149; 33 Am. Dec. 463; *Golden v. Newbrand*, 52 Iowa, 59; 35 Am. Rep. 257; *Commonwealth v. Nichols*, 10 Met. 259; 43 Am. Dec. 432, and note. A general authority by an employer to his clerk to sell unlawfully will render him answerable criminally for any sale in pursuance of such authority: *Kinnebrew v. State*, 80 Ga. 232.

HOWARD v. CITY OF WORCESTER.

[158 MASSACHUSETTS, 426.]

MUNICIPAL CORPORATION IS NOT ANSWERABLE FOR THE NEGLIGENT ACT OF ITS SERVANT while engaged in excavating for the foundation of a school-house, though such negligence caused an injury to a person on an adjacent highway not within the limits of the school-house lot.

MUNICIPAL CORPORATION IS NOT ANSWERABLE FOR THE NEGLIGENCE OF ITS SERVANTS while they are engaged in a work purely for the benefit of the public.

ACTION of tort to recover compensation for injuries suffered by plaintiff from the negligence of defendant's servant in blasting rock while excavating for the foundation of a school-house. The blast from which the injury was suffered was done under a contract between defendant and one Kenney and with the knowledge of the servant. The negligence complained of consisted in the omission of Kenney to give any notice of the blast to plaintiff, who was, in the exercise of due care, traveling along the public highway near the school-

house lot. The trial judge ruled that the plaintiff was not entitled to recover, and he excepted.

F. P. Goulding, for the defendant.

F. A. Gaskill and E. H. Vaughan, for the plaintiff.

C. ALLEN, J. The city contends, that even assuming that Kenney was its servant in such a sense that ordinarily it might be responsible for his acts or his negligence, it is nevertheless exempt from responsibility to the plaintiff in the present case by reason of the nature of the work which it was carrying on, namely, the construction of a school-house for public use.

It was held in the familiar case of *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332, that a city is not responsible in damages to a child attending a public school in a school-house provided by the city, under the duty imposed upon it by general laws, for an injury sustained by the child by reason of the unsafe condition of a staircase in the building. In *Bigelow v. Randolph*, 14 Gray, 541, a similar doctrine was applied where a scholar received an injury from a dangerous excavation in the school-house yard. The doctrine was reiterated in *Sullivan v. Boston*, 126 Mass. 540. It has also been applied to other public grounds, like Boston Common: *Oliver v. Worcester*, 102 Mass. 489; 3 Am. Rep. 485; *Steele v. Boston*, 128 Mass. 583; *Clark v. Waltham*, 128 Mass. 567; *Veale v. Boston*, 135 Mass. 187. On the same principle, a city was declared to be exempt from responsibility for a personal injury received in consequence of the defective condition of a public hospital: *Benton v. Boston City Hospital*, 140 Mass. 13; 54 Am. Rep. 436. In other states a similar rule of exemption has been adopted in reference to school-houses and other public buildings maintained solely for public use and service: *Wixon v. Newport*, 13 R. I. 454, 43 Am. Rep. 35, school-house; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302, town-house; *Hamilton Commissioners v. Mighels*, 7 Ohio St. 109, court-house; *Freeholders of Sussex v. Strader*, 18 N. J. L. 108, 121, 35 Am. Dec. 530, dictum of Hornblower, C. J., as to court-houses and jails.

The principle on which this exemption from responsibility rests is, that in the various instances referred to, the building was erected or the grounds were prepared solely for the public use, and with a sole view to the general benefit, and under the

requirement or authority of general laws. In such cases, in the absence of any statute which directly or by implication gives a private remedy, no action lies in favor of a person who has received an injury in consequence of a negligent or defective performance of the public service.

The cases heretofore cited relate to injuries received after the completion of the work. It makes no difference, however, if the injury is caused by a negligent act done in the direct performance of the service: *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87; 6 Am. Rep. 196; *Tindley v. Salem*, 137 Mass. 171; 50 Am. Rep. 289; *Lincoln v. Boston*, 148 Mass. 578; 12 Am. St. Rep. 601.

The plaintiff seeks to establish a distinction, on the ground that her injury was received outside of the limits of the public work, relying on an expression in the judgment in *Hill v. Boston*, above cited, at page 358, and on the various decisions where cities and towns have been held responsible for injuries caused by or in the course of the construction of roads and bridges by blasting rocks, setting back water, etc.; for example, *Lawrence v. Fairhaven*, 5 Gray, 110; *Deane v. Randolph*, 132 Mass. 475; and *Waldron v. Haverhill*, 143 Mass. 582. These cases, however, rest on grounds which take them out of the general rule, and in the last resort it must probably be considered that, taking all the statutes together which relate to the construction of roads and bridges, it is to be inferred that the legislature intended to recognize the existence of a liability for the consequences of negligence in the performance of the work.

In the present case, the service in which the city was engaged was purely for the benefit of the public, and we think the case falls within the general rule which exonerates it from responsibility for the consequences of its servant's negligence. The servant himself may be responsible; the city is exempt. See also *Neff v. Wellesley*, 148 Mass. 487; *Curran v. Boston*, 151 Mass. 505; 21 Am. St. Rep. 465; *Bates v. Westborough*, 151 Mass. 174.

Exceptions sustained.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE IN PERFORMING PUBLIC DUTY. — A municipal corporation cannot be held liable for the negligence of its servants or agents when it is performing a duty strictly for the benefit of the public; *Curran v. Boston*, 151 Mass. 505; 21 Am. St. Rep. 465, and note; *Moffitt v. Asheville*, 103 N. C. 237; 14 Am. St. Rep. 810, and note; *Hill v. Boston*, 122 Mass. 344; 23 Am. Rep. 332, and note; *Richmond*

v. Long, 17 Gratt. 375; 94 Am. Dec. 461, and note; *Stewart v. New Orleans*, 9 La. Ann. 461; 61 Am. Dec. 218; *Hickox v. Cleveland*, 8 Ohio, 543; 32 Am. Dec. 730, and note; *McDade v. Chester*, 117 Pa. St. 414; *Follmann v. Man-
kato*, 45 Minn. 457.

BUTTERFIELD v. BYRON.

[158 MASSACHUSETTS, 517.]

**CONTRACT PARTLY PERFORMED THE FUTURE PERFORMANCE OF WHICH BE-
COMES IMPOSSIBLE.** — If one contracts to furnish labor and material, and
construct a chattel or build a house on the land of another, he will not
ordinarily be excused from the performance of his contract by the de-
struction of the chattel or building, without his fault, before the time
fixed for the delivery of it. On the other hand, when work is to be
done under a contract on a chattel or building, which is not wholly the
property of the contractor, or for which he is not solely accountable, as
where repairs are to be made on the property of another, the agreement
of both parties is upon an implied condition that the chattel or building
shall continue in existence, and the destruction of it, without the fault
of either of the parties, will excuse performance of the contract, and
leave no right to recover damages in favor of either against the other for
its non-performance.

**CONTRACT TO PERFORM A PORTION OF A WORK AND TO FURNISH A POR-
TION OF THE MATERIALS** required in the erection of a building is, upon
upon the destruction of the building, after its partial completion, termi-
nated, so that the contractor is under no obligation to perform the like
work or furnish the like materials, should the person with whom he
contracted conclude to re-erect the destroyed building. No damages
can be recovered of the contractor for not completing the building, but
he is entitled to recover for what he had done and furnished up to the
time it was destroyed.

ACTION for breach of a building contract, whereby plaintiff
agreed to do the grading, excavating, stone-work, and plumb-
ing, and the defendant to do the remaining work, and furnish
the other materials, for a certain building to be erected on the
property of the plaintiff, and to be completed on or before May
29, 1889. The defendant was to receive eight thousand five
hundred dollars, to be paid, seventy-five per cent of the value
thereof at the end of each month, and the balance within
thirty days after the building should be completed. The
time for the performance of the contract had been extended
by agreement to June 10, 1889. On May 25, 1889, the build-
ing, when almost complete, was struck by lightning and de-
stroyed by fire. Up to that time defendant had been paid
\$5,652.30. The plaintiff had insured his interest in the build-
ing, and having been paid the amount of his insurance, he
assigned any claims he had against the defendant to the in-

sure, for whose benefit the action was brought. No demand was made on the defendant to rebuild. The trial court directed a verdict for the defendant.

G. D. Robinson, for the plaintiff.

G. M. Stearns and W. B. Stone, for the defendant.

KNOWLTON, J. It is well-established law, that where one contracts to furnish labor and materials, and construct a chattel or build a house on land of another, he will not ordinarily be excused from performance of his contract by the destruction of the chattel or building, without his fault, before the time fixed for the delivery of it: *Adams v. Nichols*, 19 Pick. 275; 31 Am. Dec. 137; *Wells v. Calnan*, 107 Mass. 514; 9 Am. Rep. 65; *Dermott v. Jones*, 2 Wall. 1; *School Trustees of Trenton v. Bennett*, 27 N. J. L. 513; 72 Am. Dec. 373; *Tompkins v. Dudley*, 25 N. Y. 272; 82 Am. Dec. 349. It is equally well settled, that when work is to be done under a contract on a chattel or building which is not wholly the property of the contractor, or for which he is not solely accountable, as where repairs are to be made on the property of another, the agreement on both sides is upon the implied condition that the chattel or building shall continue in existence, and the destruction of it without the fault of either of the parties will excuse performance of the contract, and leave no right of recovery of damages in favor of either against the other: *Taylor v. Caldwell*, 3 Best & S. 826; *Lord v. Wheeler*, 1 Gray, 282; *Gilbert etc. Mfg. Co. v. Butler*, 146 Mass. 82; *Eliot Nat. Bank v. Beal*, 141 Mass. 566, and cases cited; *Dexter v. Norton*, 47 N. Y. 62; 7 Am. Rep. 415; *Walker v. Tucker*, 70 Ill. 527. In such cases, from the very nature of the agreement as applied to the subject-matter, it is manifest that while nothing is expressly said about it, the parties contemplated the continued existence of that to which the contract relates. The implied condition is a part of the contract, as if it were written into it, and by its terms the contract is not to be performed if the subject-matter of it is destroyed, without the fault of either of the parties, before the time for complete performance has arrived.

The fundamental question in the present case is, What is the true interpretation of the contract? Was the house while in the process of erection to be in the control and at the sole risk of the defendant? or was the plaintiff to have a like interest, as the builder of a part of it? Was the defendant's

undertaking to go on and build and deliver such a house as the contract called for, even if he should be obliged again and again to begin anew on account of the repeated destruction of a partly completed building by inevitable accident? or did his contract relate to one building only, so that it would be at an end if the building, when nearly completed, should perish without his fault? It is to be noticed that his agreement was not to build a house, furnishing all the labor and materials therefor. His contract was of a very different kind. The specifications are incorporated into it, and it appears that it was an agreement to contribute certain labor and materials towards the erection of a house on land of the plaintiff, towards the erection of which the plaintiff himself was to contribute other labor and materials, which contributions would together make a completed house. The grading, excavating, stone-work, brick-work, painting, and plumbing were to be done by the plaintiff.

Immediately before the fire, when the house was nearly completed, the defendant's contract, so far as it remained unperformed, was to finish a house on the plaintiff's land, which had been constructed from materials and by labor furnished in part by the plaintiff and in part by himself. He was no more responsible that the house should continue in existence than the plaintiff was. Looking at the situation of the parties at that time, it was like a contract to make repairs on the house of another. His undertaking and duty to go on and finish the work was upon an implied condition that the house, the product of their joint contributions, should remain in existence. The destruction of it by fire discharged him from his contract. The fact that the house was not in existence when the contract was made is immaterial: *Howell v. Coup-land*, L. R. 1 Q. B. D. 258.

It seems very clear that, after the building was burned, and just before the day fixed for the completion of the contract, the defendant could not have compelled the plaintiff to do the grading, excavating, stone-work, brick-work, painting, and plumbing for another house of the same kind. The plaintiff might have answered: "I do not desire to build another house which cannot be completed until long after the date at which I wished to use my house. My contract related to one house. Since that has been destroyed without my fault, I am under no further obligation." If the plaintiff could successfully have made this answer to a demand by the defendant that he

should do his part towards the erection of a second building, then certainly the defendant can prevail on a similar answer in the present suit. In other words, looking at the contract from the plaintiff's position, it seems manifest that he did not agree to furnish the work and materials required of him by the specifications for more than one house, and if that was destroyed by inevitable accident, just before its completion, he was not bound to build another, or to do anything further under his contract. If the plaintiff was not obliged to make his contribution of work and materials towards the building of a second house, neither was the defendant. The agreement of each to complete the performance of the contract after a building, the product of their joint contributions, had been partly erected, was on an implied condition that the building should continue in existence. Neither can recover anything of the other under the contract, for neither has performed the contract so that its stipulations can be availed of. The case of *Cook v. McCabe*, 53 Wis. 250, 40 Am. Rep. 765, was very similar in its facts to the one at bar, and identical with it in principle. There the court, in an elaborate opinion, after a full consideration of the authorities, held that the contractor could recover of the owner a *pro rata* share of the contract price for the work performed and the materials furnished before the fire. *Clark v. Franklin*, 7 Leigh, 1, is of similar purport.

What are the rights of the parties in regard to what has been done in part performance of a contract in which there is an implied condition that the subject to which the contract relates shall continue in existence, and where the contemplated work cannot be completed by reason of the destruction of the property, without fault of either of the parties, is in dispute upon the authorities. The decisions of England differ from those of Massachusetts, and of most of the other states of this country. There the general rule, stated broadly, seems to be, that the loss must remain where it first falls, and that neither of the parties can recover of the other for anything done under the contract. In England, on authority, and upon original grounds not very satisfactory to the judges of recent times, it is held that freight advanced for the transportation of goods subsequently lost by the perils of the sea cannot be recovered back: *Allison v. Bristol Ins. Co.*, L. R. 1 App. Cas. 209, 226; *Byrne v. Schiller*, L. R. 6 Ex. 319. In the United States and in continental Europe the rule is dif-

ferent: *Griggs v. Austin*, 3 Pick. 20, 22; 15 Am. Dec. 175; *Brown v. Harris*, 2 Gray, 359. In England it is held that one who has partly performed a contract on property of another, which is destroyed without the fault of either party, can recover nothing; and on the other hand, that one who has advanced payments on account of labor and materials furnished under such circumstances cannot recover back the money: *Appleby v. Myers*, L. R. 2 Com. P. 651; *Anglo-Egyptian Navigation Co. v. Rennie*, L. R. 10 Com. P. 271. One who has advanced money for the instruction of his son in a trade cannot recover it back if he who received it dies without giving the instruction: *Whincup v. Hughes*, L. R. 6 Com. P. 78. But where one dies and leaves unperformed a contract which is entire, his administrator may recover any installments which were due on it before his death: *Stubbs v. Holywell R'y Co.*, L. R. 2 Ex. 311.

In this country, where one is to make repairs on a house of another, under a special contract, or is to furnish a part of the work and materials used in the erection of a house, and his contract becomes impossible of performance on account of the destruction of the house, the rule is uniform, so far as the authorities have come to our attention, that he may recover for what he has done or furnished. In *Cleary v. Sohler*, 120 Mass. 210, the plaintiff made a contract to lath and plaster a certain building for forty cents per square yard. The building was destroyed by a fire which was an unavoidable casualty. The plaintiff had lathed the building and put on the first coat of plaster, and would have put on the second coat, according to his contract, if the building had not been burned. He sued on an implied *assumpsit* for work done and materials found. It was agreed that if he was entitled to recover anything, the judgment should be for the price charged. It was held that he could recover. See also *Lord v. Wheeler*, 1 Gray, 282; *Wells v. Calnan*, 107 Mass. 514, 517; 9 Am. Rep. 65. In *Cook v. McCabe*, 53 Wis. 250, 40 Am. Rep. 765, the plaintiff recovered *pro rata* under his contract, — that is, as we understand, he recovered on an implied *assumpsit* at the contract rate. In *Hollis v. Chapman*, 36 Tex. 1, and in *Clark v. Franklin*, 7 Leigh, 1, the recovery was a proportional part of the contract price. To the same effect are *Schwartz v. Saunders*, 46 Ill. 18; *Rawson v. Clark*, 70 Ill. 656; and *Clark v. Busse*, 82 Ill. 515. The same principle is applied to different facts in *Jones v. Judd*, 4 N. Y. 411, and in *Hargrave v.*

Conroy, 19 N. J. Eq. 281. If the owner in such a case has paid in advance, he may recover back his money, or so much of it as was an overpayment. The principle seems to be, that when, under an implied condition of the contract, the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do that which was contemplated by the contract, there is an implied *assumpsit* for what has properly been done by either of them, the law dealing with it as done at the request of the other, and creating a liability to pay for it its value, to be determined by the price stipulated in the contract, or in some other way if the contract price cannot be made applicable. Where there is a bilateral contract for an entire consideration moving from each party, and the contract cannot be performed, it may be held that the consideration on each side is the performance of the contract by the other, and that a failure completely to perform it is a failure of the entire consideration, leaving each party, if there has been no breach or fault on either side, to his implied *assumpsit* for what he has done.

The only question that remains in the present case is one of pleading. The defendant is entitled to be compensated at the contract price for all he did before the fire. The plaintiff is to be allowed for all his payments. If the payments are to be treated merely as advancements on account of a single entire consideration, namely, the completion of the whole work, the work not having been completed, they may be sued for in this action, and the defendant's only remedy available in this suit is by a declaration in set-off. If, on the other hand, each installment due was a separate consideration for the payment made at the time, then as to those installments and the payments of them the contract is completely executed, and the plaintiff can recover nothing, and the implied *assumpsit* in favor of the defendant can be only for the part which remains unpaid.

We are of opinion that the consideration which the defendant was to receive was an entire sum for the performance of the contract, and that the payments made were merely advances on account of it, and that on his failure to perform the contract, there was a failure of consideration which gave the plaintiff a right to sue for money had and received, and that the like failure of consideration on the other side gave

the defendant a right to sue on an implied *assumpsit* for work done and materials found.

The thirty-eight dollars due from the defendant to the plaintiff cannot be recovered in this action. The report and the pleadings show that the suit was brought under an assignment for the benefit of the insurers, to recover damages for a breach of the contract for the erection of the building, and not to recover the value of the shingles or weights carried away from the ruins.

According to the terms of the report, the ruling being wrong, such order may be made as this court shall direct. A majority of the court are of opinion that the verdict should be set aside, and the defendant be given leave to file a declaration in set-off, if he is so advised, on such terms as the superior court deems reasonable.

Verdict set aside.

CONTRACT — PART PERFORMANCE OF — COMPLETE PERFORMANCE RENDERED IMPOSSIBLE — LIABILITY UNDER. — Under a contract to erect an addition to a building for a fixed sum, there can be no recovery where a complete performance was prevented by a destruction of the building by fire: *Fildew v. Besley*, 42 Mich. 100; 36 Am. Rep. 433, and note; compare *Cook v. McCabe*, 53 Wis. 250; 40 Am. Rep. 765; see note to *Dewey v. Alpena etc. District*, 38 Am. Rep. 208. Where the continued existence of the means of performance of a contract is essential to such performance, such continued existence of the means of performance is a condition, without which, in the absence of fault, there can be no liability: *Shear v. Wright*, 60 Mich. 159; see *Cutcliff v. McAnnally*, 88 Ala. 507.

FONSECA v. CUNARD STEAMSHIP COMPANY.

[153 MASSACHUSETTS, 553.]

CONTRACT — FAILURE TO READ. — One who accepts a contract and avails himself of its provisions is bound by the stipulations and conditions expressed in it, whether he reads them or not.

CARRIERS — PASSENGER CONTRACT TICKET. — One who accepts a passenger contract ticket, consisting of two large pages, signed by the carrier, and with a blank space for the signature of the passenger, and which contains elaborate provisions regarding the rights of the passenger on the voyage, thereby assents to such provisions, and is bound by them, whether he reads them or not.

CARRIERS — CONFLICT OF LAWS. — A CONTRACT MADE IN ENGLAND for the carriage of a passenger to the United States, though regarded by the laws of this state as against public policy and void, will be enforced here, if not illegal or immoral. Hence one accepting a passenger ticket contract in England, exempting the carrier from liability for loss resulting from its negligence, cannot recover in this state for a loss suffered through such negligence.

ACTION upon contract, with a count in tort, to recover for the damages suffered by plaintiff from the loss of a trunk and its contents while on a steamship of the defendant in which the plaintiff was a passenger. The plaintiff had accepted what was known and styled a "passenger's contract ticket," containing numerous provisions respecting the rights of passengers, among which was one declaring that the carrier did not hold itself liable for loss, detention, or damage of luggage. The plaintiff received this ticket without reading it, and without his attention being in any way called to the different provisions contained therein. The trial judge found that the English law permitted a contract exempting a carrier from liability for loss resulting from its negligence; that the contract in question was sufficient in terms to relieve the defendant from liability; but he was of the opinion that the law of Massachusetts governed the action, and therefore that the plaintiff was entitled to recover.

J. H. Appleton, for the plaintiff.

G. Putnam and T. Russell, for the defendant.

KNOWLTON, J. It is not expressly stated in the report that the law of England was put in evidence as a fact in the case, but it seems to have been assumed at the trial, if not expressly agreed, that this law should be considered, and the argument before this court has proceeded on the same assumption. It is conceded that the presiding justice correctly found and ruled as follows: "That the contract was a British contract; that, by the English law, a carrier may, by contract, exempt himself from liability, even for loss caused by his negligence; that in this case, as the carrier has so attempted, and the terms are broad enough to exonerate him, the question remains of assent on the part of the plaintiff." That part of his ruling which is called in question by the defendant is as follows: "This has been decided in Massachusetts to be a question of evidence, in which the *lex fori* is to govern; that although it has been decided that the law conclusively presumes that a consignor knows and assents to the terms of a bill of lading or a shipping receipt which he takes without dissent, yet a passenger ticket, even though it be called a 'contract ticket,' does not stand on the same footing; that in this case assent is not a conclusion of law, and is not proved as a matter of fact."

The principal question before us is, whether the plaintiff, by reason of his acceptance and use of his ticket, shall be conclusively held to have assented to its terms. It has often been decided that one who accepts a contract, and proceeds to avail himself of its provisions, is bound by the stipulations and conditions expressed in it, whether he reads them or not: *Rice v. Dwight Mfg. Co.*, 2 Cush. 80; *Grace v. Adams*, 100 Mass. 505; 97 Am. Dec. 117; 1 Am. Rep. 131; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304; 15 Am. Rep. 106; *Monitor etc. Ins. Co. v. Buffum*, 115 Mass. 343; *Germania Ins. Co. v. Memphis etc. R. R. Co.*, 72 N. Y. 90; 28 Am. Rep. 113. This rule is as applicable to contracts for the carriage of persons or property as to contracts of any other kind: *Grace v. Adams*, 100 Mass. 505; 97 Am. Dec. 117; 1 Am. Rep. 131; *Boston etc. R. R. Co. v. Chipman*, 146 Mass. 107; 4 Am. St. Rep. 293; *Parker v. South Eastern R'y Co.*, L. R. 2 C. P. D. 416, 428; *Harris v. Great Western R'y Co.*, L. R. 1 Q. B. D. 515; *York Co. v. Central Railroad*, 3 Wall. 107; *Hill v. Syracuse etc. R. R. Co.*, 73 N. Y. 351; 29 Am. Rep. 163. The cases in which it is held that one who receives a ticket that appears to be a mere check, showing the points between which he is entitled to be carried, and that contains conditions on its back which he does not read, is not bound by such conditions, do not fall within this rule: *Brown v. Eastern R. R. Co.*, 11 Cush. 97; *Malone v. Boston etc. R. R. Corp.*, 12 Gray, 388; 74 Am. Dec. 598; *Henderson v. Stevenson*, L. R. 2 H. L. S. 470; *Quimby v. Vanderbilt*, 17 N. Y. 306; 72 Am. Dec. 469; *Railway Co. v. Stevens*, 95 U. S. 655. Such a ticket does not purport to be a contract which expressly states the rights of the parties, but only a check to indicate the route over which the passenger is to be carried, and he is not expected to examine it to see whether it contains any unusual stipulations. The precise question in the present case is, whether the "contract ticket" was of such a kind that the passenger taking it should have understood that it was a contract containing stipulations which would determine the rights of the parties in reference to his carriage. If so, he would be expected to read it, and if he failed to do so, he is bound by its stipulations. It covered with print and writing the greater part of two large quarto pages, and bore the signature of the defendant company affixed by its agent, with a blank space for the signature of the passenger. The fact that it was not signed by the plaintiff is immaterial: *Quimby v. Boston etc. R. R. Co.*, 150 Mass.

365, and cases there cited. It contained elaborate provisions in regard to the rights of the passenger on the voyage, and even went into such detail as to give the bill of fare for each meal in the day for every day of the week. No one who could read could glance at it without seeing that it undertook expressly to prescribe the particulars which should govern the conduct of the parties until the passenger reached the port of destination. In that particular, it was entirely unlike the pasteboard tickets which are commonly sold to passengers on railroads. In reference to this question, the same rules of law apply to a contract to carry a passenger as to a contract for the transportation of goods. There is no reason why a consignor who is bound by the provisions of a bill of lading, which he accepts without reading, should not be equally bound by the terms of a contract in similar form to receive and transport him as a passenger. In *Henderson v. Stevenson*, L. R. 2 H. L. S. 470, the ticket was for transportation a short distance, from Dublin to Whitehaven, and the passenger was held not bound to read the notice on the back, because it did not purport to be a contract, but a mere check, given as evidence of his right to carriage. In later English cases it is said that this decision went to the extreme limit of the law, and it has repeatedly been distinguished from cases where the ticket was in a different form: *Parker v. South Eastern R'y Co.*, L. R. 2 C. P. D. 416, 428; *Burke v. South Eastern R'y Co.*, L. R. 5 C. P. D. 1; *Harris v. Great Western R'y Co.*, L. R. 1 Q. B. D. 515. The passenger in the last-mentioned case had a coupon ticket, and it was held that he was bound to know what was printed as a part of the ticket. *Steers v. Liverpool etc. Steamship Co.*, 57 N. Y. 1, 15 Am. Rep. 453, is in its essential facts almost identical with the case at bar, and it was held that the passenger was bound by the conditions printed on the ticket. In *Quimby v. Boston etc. R. R. Co.*, 150 Mass. 365, the same principle was applied to the case of a passenger traveling on a free pass, and no sound distinction can be made between that case and the case at bar.

We are of opinion that the ticket delivered to the plaintiff purported to be a contract, and that the defendant corporation had a right to assume that he assented to its provisions. All these provisions are equally binding on him as if he had read them.

The contract being valid in England, where it was made, and the plaintiff's acceptance of it, under the circumstances,

being equivalent to an express assent to it, and it not being illegal or immoral, it will be enforced here, notwithstanding that a similar contract made in Massachusetts would be held void, as against public policy: *Greenwood v. Curtis*, 6 Mass. 358; 4 Am. Dec. 145; *Forepaugh v. Delaware etc. R. R. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672, and cases cited; *In re Missouri Steamship Co.*, L. R. 42 Ch. Div. 321, 326, 327; *Liverpool etc. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397.

Judgment for the defendant.

CARRIERS — CONTRACTS — BINDING EFFECT OF STIPULATIONS IN. — In an action against a carrier for loss of goods, the plaintiff cannot, in the absence of fraud, show that he did not read the stipulations in the bill of lading: *Grace v. Adams*, 100 Mass. 505; 97 Am. Dec. 117, and note; for, in the absence of fraud, the presumption is, that stipulations limiting the common-law liability of a carrier, contained in the contract, are known to the party accepting it: *Steers v. Liverpool etc. S. S. Co.*, 57 N. Y. 1; 15 Am. Rep. 453; *Mulligan v. Illinois C. R'y Co.*, 36 Iowa, 181; 14 Am. Rep. 514. But a passenger is not presumed to know, and is not bound by, a printed stipulation in his ticket limiting the weight and value of his baggage, unless he has actual notice thereof when the ticket was purchased: *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y. 212; 8 Am. Rep. 543; nor is he bound by stipulations in a ticket printed in a language of which he is wholly ignorant, unless the same was fully explained to him: *Camden etc. R. R. Co. v. Baldauf*, 16 Pa. St. 67; 55 Am. Dec. 481. In *Bethea v. North Eastern R. R. Co.*, 26 S. C. 91, the court decided that a purchaser of a railroad ticket, having signed his name to a contract printed thereon, must be presumed, in the absence of fraud or mistake, to have read the contract, and to have assented to its stipulations.

CONFLICT OF LAWS — CONTRACTS — ENFORCEMENT OF. — A contract may be enforced, if valid under the laws of the state where it was made, although it would have been void if made in the state in which the action is brought: *Dugan v. Lewis*, 79 Tex. 246; 23 Am. St. Rep. 332; *Brown v. Browning*, 15 R. I. 422; 2 Am. St. Rep. 908; unless it is clearly contrary to good morals, or repugnant to the policy or positive statutes of the jurisdiction in which it is sought to be enforced: *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23; compare *Birdseye v. Underhill*, 82 Ga. 142; 14 Am. St. Rep. 142. Courts will enforce contracts valid by the laws of the country or state wherein they were made: *Gross v. Jordan*, 83 Me. 380; *Dike v. Erie R'y Co.*, 45 N. Y. 113; 6 Am. Rep. 43; unless they are injurious to the citizens of the state or country wherein the remedy is sought: *Forepaugh v. Delaware etc. R. R. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

BATES v. RAILWAY COMPANY.

[90 TENNESSEE, 36.]

TURN-TABLE, RAILWAY COMPANY'S DUTY AS TO FASTENING. — In an action against a railway company to recover damages for injuries received by a boy nine years old while endeavoring to leap upon a revolving turn-table maintained by the company in a place away from the public road, but frequented by boys and others for recreation and sport, in which the declaration alleges that the defendant was negligent in maintaining the turn-table exposed and uninclosed, and without any secure lock or fastening, and in which the proof shows that the turn-table was fastened by a sliding wooden bolt which passed in a slot under the cross-ties, and could not be moved without withdrawing this piece of timber, and that this bolt was removed by one of the plaintiff's companions, it is proper to charge the jury that the defendant was not required to so fasten or secure the turn-table that boys like the plaintiff could not displace such fastening and put the table in motion, and that the defendant was not required to fasten the turn-table any more securely than necessary to keep it securely in place. And the court should not qualify these instructions by charging the jury that in deciding whether the defendant was negligent or not, they might, among other things, consider the amount of force or strength required to unfasten the turn-table.

CONFLICTING INSTRUCTIONS TO JURY, GIVING OF, GROUND FOR REVERSAL.

— The giving to a jury of an instruction in irreconcilable conflict with another instruction previously given confuses the minds of the jury, and is a good ground for reversal.

ACTION for personal injuries. The opinion states the case.

Pitts and Meeks, for Bates.

Roy Fitzpatrick and Charles D. Porter, for the Railway Company.

J. M. DICKINSON, J. This suit was brought by Bates, as next friend of his son, who, at the age of nine, was injured upon defendant's turn-table.

The proof shows that the turn-table was situated near the town of Centreville, away from the public road, but near a place frequented by boys and others for recreation and sport.

The accident occurred on Sunday, when no one in the employ of defendant was on duty. The turn-table was fastened by a sliding wooden bolt, which passed in a slot under the cross-ties, and could not be moved without this piece of timber being withdrawn. One of Bates's companions removed this bolt, and while the table was being revolved — it requiring the united efforts of three or four of the boys — Bates, having said he was going to get on it or die as it came around, made an effort to do so and slipped. His leg was caught between the end of the table and the track, and was crushed, necessitating amputation.

The declaration charges defendant with negligence in maintaining the turn-table "exposed and uninclosed, and without any secure lock or fastening."

If defendant's negligence in any other respect caused the injury, it could not be looked to by the jury, inasmuch as the plaintiff has founded his action alone on the alleged negligence in having the turn-table exposed, unguarded, uninclosed, and without any secure lock or fastening.

On a previous trial there was a reversal, because the circuit judge refused to charge, — 1. That the defendant was not required to so fasten or secure the turn-table that the boys like the injured boy could not displace such fastening and put the table in motion; 2. That the defendant was not required to fasten the turn-table any more securely than necessary to keep it securely in place.

There was a new trial resulting in a verdict against defendant.

Several errors are assigned. The writer is of the opinion that the entire assignment of errors is fatally defective, in that it does not comply with rule 29 of this court, and that the judgment should be affirmed, but the other members of the court hold that they are sufficient.

Only the second and sixth grounds will be noticed. The second ground is, that the judge charged that the jury, in deciding whether the defendant was negligent, might, among

other things, consider "the amount of force or strength required to unfasten" the turn-table.

In a subsequent part of his charge, he gave the jury the instructions approved by this court, as above set out. These instructions should have eliminated from the case the question of the amount of force or strength required to unfasten the turn-table, as an element of negligence.

If the fastening was sufficient, if undisturbed, to hold the turn-table securely in place, the fact that it could be unfastened by a great or slight exertion of strength directed immediately to that purpose could not properly be considered as an evidence of negligence on the part of defendant. And yet the judge expressly instructed the jury that it might be looked to for this purpose. This error cannot be assumed to have been corrected by the subsequent part of the charge, and it is impossible to judge how far the jury may have been influenced by it.

Under the charge as given, the jury might infer negligence if they found the fastening sufficient to hold the turn-table securely in place; and, in addition, that boys like the injured boy could, by slight or even great exertion, remove it.

The sixth assignment of error is, that the judge, while giving the instructions approved by this court, as above set out, improperly qualified them. He charged as follows: "If the turn-table of defendant was reasonably safe, located as it was and fastened as it was, it would be sufficient, and defendant would not be liable; but if it was not reasonably safe, fastened as it was, under all the circumstances surrounding, it would not limit or lessen the liability of the company to show that other turn-tables belonging to the same company or to other railroad companies were fastened or secured in the same manner, nor that this was the customary mode of fastening turn-tables; but this is a circumstance proper to be looked to by you in determining the question of whether or not this railroad company exercised ordinary care under the circumstances of this case, the question in this case being, whether this particular turn-table was reasonably safe under the circumstances. The defendant was not required, under the law, to so fasten or secure the turn-table that boys like the plaintiff could not displace such fastenings and set the table in motion. On the contrary, defendant was only required to so fasten it as to keep it securely in its place. Yet, if the jury find from the evidence, notwithstanding the turn-table was not required

to be so fastened as above stated, that defendant, its agents or employees, could, by the exercise of ordinary prudence and care, have avoided or prevented the injury to plaintiff, then they should find for the plaintiff, unless, as before stated and explained in this charge, plaintiff's injury was brought about by his own negligence, in which event he could not recover. What would be the exercise of ordinary prudence and care on the part of defendant, its agents and employees, would be the care and prudence which men ordinarily and generally use under similar circumstances."

This is confusing, even upon the closest study and analysis, and just what direction it gave the minds of a jury it is difficult to conceive.

The charge used on the former trial—which was framed upon a conception of the law not harmonious with the instructions approved by this court—was repeated on the second trial, with these instructions interpolated with an added qualification. The result is inharmonious, and the charge is conflicting. The jury is first instructed to ascertain whether or not the turn-table, as it was fastened, was reasonably safe under all the circumstances. This manifestly directed the inquiry as to the safety of the fastening as against interference by boys. He had previously, in directing the minds of the jury to a consideration of all the circumstances, told them to look to the attractiveness of the turn-table as a plaything, and the strength necessary to remove the fastening. Under this part of the charge, the jury could find defendant guilty of negligence, if the turn-table was so fastened that boys like those in question could open it. Then follows the instruction that the fact that the boys could displace the fastening was not sufficient to convict defendant of negligence, and then the principle that defendant was only required to fasten it so as to keep it securely in its place.

This is in irreconcilable conflict with the prior instruction, permitting them to find negligence if the fastening was not secure against interference by such boys. A fastening designed to prevent the tampering of persons has a wholly different purpose from one made to hold parts of machinery in place under the influence of natural causes and the operations for which it was constructed. Then follows the qualification that, notwithstanding what the court has already charged, the jury may find for plaintiff, if the evidence

shows that defendant could, by ordinary care, have prevented the injury, although the turn-table was not required to be fastened **so that** boys like the plaintiff could not set it in motion.

The question under immediate consideration was the alleged negligence in respect of the fastening. This qualification upon the instructions approved by this court, introduced and emphasized by a disjunctive, was tantamount to saying that having a fastening that such boys could undo was not of itself negligence; but if such was the case, and the damages incident to such interference by the boys could, by ordinary care, have been provided against by defendant, it would be negligent for it not to do so. This might justify the jury in finding that while it was not negligent in defendant to have a fastening that such boys could remove, it would be negligent for not making it more difficult of removal than it was, or for not having a watchman to guard against such interference.

These or any similar conclusions would be directly antagonistic to the principle already declared by this court, that defendant was only bound to have a fastening adapted to securely hold the turn-table in place. The minds of the jury were, by the qualification stated, drawn away from this instruction.

For the errors indicated, the cause will be reversed and remanded.

RAILROADS — DANGEROUS APPLIANCES ON PREMISES — DUTY TO CHILDREN. — A railroad company is not required to make its premises a safe play-ground for children; but when it has thereon dangerous machinery, attractive and alluring to them, and in such position that they can reach it, the company must use ordinary and reasonable care to protect them: *Heasley v. Winona etc. R. R. Co.*, 46 Minn. 233; 24 Am. St. Rep. 220, and note. See extended note to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 595. See *Westerfield v. Levis*, 43 La. Ann. 63; *Barrett v. Southern Pacific Co.*, 91 Cal. 296; *ante*, p. 186.

APPEAL AND ERROR — CONFLICTING INSTRUCTIONS — GROUNDS FOR REVERSAL. — Where the statute of limitations is pleaded, conflicting instructions as to the time when it commenced to run are grounds for reversal: *Haight v. Vallet*, 89 Cal. 245; 23 Am. St. Rep. 465.

RAILWAY COMPANY v. MOSSMAN.

[90 TENNESSEE, 157.]

RAILWAY EMBANKMENT, LIABILITY FOR SO CONSTRUCTING, AS TO INJURE ADJOINING LANDS.—A railway company which constructs upon its right of way an embankment without culverts, in such a manner as to cause surface water to back upon and injure adjoining lands, is liable to the owner of the lands for the injury thereto.

EASEMENT TO FLOW BACK-WATER UPON LANDS ACQUIRED BY MAINTENANCE OF EMBANKMENT FOR TWENTY YEARS.—A servitude of drainage or flowage of water over adjacent lower lands may be lost by abandonment, and the servient estate may acquire a counter-easement to flow back-water upon the lands of the dominant estate by the erection and maintenance of an embankment impeding the natural drainage over the lower lands, and backing such surface water upon the higher lands; and where a railway company has, under claim of right, for a period of twenty years, maintained such an embankment continuously, without interruption, by suit or otherwise, no action can be maintained against it by the owner of such higher lands.

THE opinion states the case.

McCorry and Bond, and Sweeney and Ward, for the Railway Company.

Lamb and Farabaugh, for Mossman.

LURTON, J. Mossman owns a body of land adjoining the right of way of plaintiff in error. His lands lie upon a slightly higher level than the company's right of way or the lands upon the opposite side of the railroad. There is evidence showing that, but for the embankment constructed and maintained by the railway company, waters falling upon Mossman's land as rain or snow, or flowing upon his lands from those at a still higher level, would naturally run off across the railway, and thence upon lower lands beyond, and finally to a small branch. By the construction of this railway embankment, and its maintenance without culverts or other means for the passage of water, surface water has been backed back upon his lands, where it accumulates in low spots, and stands, making his land swampy, and in part unfit for agricultural use. This embankment was constructed some thirty years before this suit was brought, and during all this time the right of flowage claimed by Mossman has been impeded, and surface water backed upon his lands.

The rule that lands lying at a lower level are burdened with the servitude of receiving all waters which naturally flow down to them from lands adjoining and upon a higher

level has, in this state, been adopted and applied not only to living streams, springs, etc., but also to surface water and waters falling as rain or snow upon such higher lands: *Louisville etc. R. R. Co. v. Hays*, 11 Lea, 382; 47 Am. Rep. 291.

So it has been held that it is the duty of a railway company to provide culverts or other means for the safe passage of accumulated surface water, and that they are liable for damages resulting from injuries to adjacent lands by waters backed upon such lands for want of proper provision for the escape of such water through the railway embankment: *Carriger v. East Tennessee etc. R. R. Co.*, 7 Lea, 388.

This liability is but a consequence of the recognized right of the dominant estate to a servitude of drainage or flowage over adjacent lower lands. The only question open, in view of these decisions, is as to whether the dominant estate may lose this easement by the maintenance of artificial embankments upon the lands of the servient estate for a period of time sufficient to presume a grant or conveyance of the easement once existing. We think that this sort of a servitude may be lost by abandonment, and that the servient estate may acquire a counter-easement to flow back-water upon the lands of the dominant estate by the erection and maintenance of an embankment impeding the natural drainage over the lower lands, and backing such surface water upon the higher lands.

The period within which, by prescription, an easement may be acquired or a servitude imposed has been settled as twenty years. If this embankment has been continuously maintained for a period of twenty years without interruption, by suit or otherwise, and during all this time surface water, which would, by nature, flow upon the lands of the railway company, has been prevented from flowing, and has been backed up on the higher lands, then there arises a presumption that the right to flowage upon the lower lands has been, by grant, surrendered, and that the lower lands have, by grant, secured the right to accumulate surface water upon the lands lying adjacent and subject to such an easement: *Wood on Nuisances*, secs. 353, 354.

There is nothing decided in the case of *Louisville etc. R. R. Co. v. Hays*, 11 Lea, 382, 47 Am. Rep. 291, in conflict with this view. In that case there had been a recognition of the duty of providing for the drainage of adjacent lands affected by the company's embankment. The suit was for neglect to

keep open a ditch, constructed and kept open for years for that purpose. This was a recognition of a servitude in favor of the estate upon a higher level. Here this servitude has been repudiated for thirty years, and an embankment maintained operating to keep surface water off of the right of way and backing it upon the dominant estate. There is no reason for taking this case out of the general principles applicable to other easements and servitudes lost and acquired by prescription.

There is no evidence to support the judgment in favor of Mossman. Judgment here for the plaintiff in error, with costs.

RAILROADS — LIABILITY FOR EMBANKMENT SO CONSTRUCTED AS TO THROW WATER UPON ADJOINING LAND. — Where a railway embankment diverts water from its natural course, and causes it to flow over the land of an adjoining owner and injure the same, it will be liable for such injury: *Austin etc. R'y Co. v. Anderson*, 79 Tex. 427; 23 Am. St. Rep. 350, and note; *St. Louis etc. R'y Co. v. Biggs*, 52 Ark. 240; 20 Am. St. Rep. 174, and extended note; *Philadelphia etc. R. R. Co. v. Davis*, 68 Md. 281; 6 Am. St. Rep. 440, and note; *Noe v. Chicago etc. R'y Co.*, 76 Iowa, 360. In an action for damages from an overflow upon the lands of plaintiff caused by a railway track, it is error to admit evidence that after the overflow the culverts were improved: *Gulf etc. R'y Co. v. McGowan*, 73 Tex. 356.

EASEMENT BY PRESCRIPTION — RIGHT TO OVERFLOW THE LAND OF ANOTHER. — An easement may be acquired by prescription, by which the water collecting upon the lands of one person must be allowed to overflow the lands of an adjacent proprietor: *Gregory v. Bush*, 64 Mich. 37; 8 Am. St. Rep. 797, and note; *Totel v. Bonnefoy*, 123 Ill. 653; 5 Am. St. Rep. 570, and note; *Mills v. Hall*, 9 Wend. 315; 24 Am. Dec. 160; *McGeorge v. Hoffman*, 133 Pa. St. 381. The right to discharge water upon the lands of another cannot be acquired by twenty years' adverse user unless the use be uninterrupted during the whole period: *Chapel v. Smith*, 80 Mich. 100; compare with this case *Montgomery v. Locke*, 72 Cal. 75. A land-owner who concentrates water and carries it where it is not accustomed to flow is liable for injury caused thereby: *Weddell v. Hupner*, 124 Ind. 315.

RAILWAY COMPANY v. BROOKS.

[90 TENNESSEE, 161.]

GARNISHEE CANNOT CONTEST VALIDITY OF JUDGMENT ON WHICH GARNISHMENT IS BASED. — A garnishee cannot contest for mere irregularity the validity of the judgment upon which the garnishment is based. The judgment debtor alone can question the validity of such judgment, on the ground that the summons in the action in which it was rendered was served by a special officer who had been appointed to make the service without a proper affidavit having been first made.

JUDGMENT OF JUSTICE OF PEACE IRREGULAR, BUT NOT VOID, WHEN. — A judgment rendered by a justice of the peace upon service of summons made by a special officer appointed upon an affidavit, which failed to show that "the business was urgent," is not void, but merely irregular.

VOID CONDITIONAL JUDGMENT AGAINST GARNISHEE NOT CURED BY SERVICE OF SCIRE FACIAS. — A conditional judgment rendered against a garnishee, without appearance by, or service of written notice upon, him, is void, and the subsequent issuance and service of a *scire facias* will not cure that defect, but the final judgment will also be void, although the garnishee failed to defend the *scire facias*.

PETITION for *certiorari* and *supersedeas*. The opinion states the case.

Barr and Jones, for the Railway Company.

No counsel for Brooks.

CALDWELL, J. This proceeding was commenced in the circuit court of Obion County by petition for *certiorari* and *supersedeas* to quash an execution issued by a justice of the peace against petitioner as garnishee.

The petition, being heard in connection with the magistrate's papers, was dismissed, on motion of the defendant, for want of merits on its face. There is an appeal in error from that action of the circuit judge.

Petitioner alleged the rendition of a judgment in favor of Brooks against Dill, and thereafter certain attempted garnishment proceedings against it as a debtor of Dill; that under these proceedings a conditional judgment was rendered by the magistrate against petitioner in favor of Brooks for the amount of his debt against Dill; and that thereafter a final judgment was rendered on the conditional judgment against petitioner, from which final judgment the execution complained of was issued and placed in the hands of an officer for collection.

Petitioner then impeached the execution against it as invalid, for two reasons: 1. That the judgment against Dill, on which the garnishment proceedings were predicated, was

void; 2. That no written notice of garnishment was served on petitioner, or any one representing it.

These reasons will be considered separately, in the order named.

1. The allegation against the original judgment is, that it was bad because rendered on a summons served by a special officer, who had been appointed to make the service without a proper affidavit having first been made, the affidavit failing to state that "the business was urgent." This is a question which could have been made by Dill, the defendant, alone. The petitioner, a garnishee, cannot contest the validity of the judgment on which the garnishment is based: *Cowan v. Lowry*, 7 Lea, 620.

The same conclusion follows, by analogy, from that line of cases in which it is decided that only the judgment debtor, and not a garnishee, can complain of the fact that execution against the former was issued within the time allowed by statute for an appeal, and on insufficient affidavit: See *Cowan v. Lowry*, 7 Lea, 625; *Miller v. O'Bannon*, 4 Lea, 398; *Carpenter v. Bank*, 1 Lea, 202; *Stanley v. Nelson*, 4 Humph. 484.

Moreover, the matter complained of was but an irregularity, and did not render the judgment void.

2. The petitioner alleges, in substance, and the return of the officer shows, that there was no written notice to the petitioner, as garnishee or otherwise, and that the only notice it had was given by the officer's reading to petitioner's agent an execution in the case of Brooks against Dill, and at the same time verbally telling him to appear and answer, etc.

This was clearly not sufficient notification, and petitioner was, by the law, allowed to ignore it utterly, as it seems to have done, with impunity. The statute requires written notice, and there is no other means by which a person may be lawfully summoned and required to answer as garnishee: See Code, secs. 3800, 4220; *History of Lawsuit*, Martin's ed., sec. 346; *Railroad Co. v. Todd*, 11 Heisk, 549.

The written notice is the original process by which the garnishee is brought before the court, and the only authority which the officer or judgment creditor has for demanding his appearance and a disclosure of his financial and property relation to the judgment debtor. Hence a judgment without service of written notice is a nullity, unless notice be waived, and the burden of showing a waiver is on the garnishment creditor, — the one claiming the benefit of it.

Any defect in garnishment proceedings may be waived as defects in other legal proceeding may be waived: *Hearn v. Crutcher*, 4 Yerg. 461; *Moody v. Alter*, 12 Heisk. 142; *Miller v. O'Bannon*, 4 Lea, 403. In this case there is nothing even indicating a waiver.

There was no appearance by the garnishee, or any one for it. Failing to appear, conditional judgment was entered against it for the amount of the plaintiff's debt, and *scire facias* was issued commanding it to show cause why judgment final should not be rendered; and upon its failure then to appear, the conditional judgment was made final, and execution awarded. These proceedings by the magistrate seem to have been regular and according to the statute (Code, secs. 3804, 4227-4229), with the important exception that there was no service of written notice in the first instance. Because of that vital omission all that followed was a nullity. The issuance and service of the *scire facias* did not cure that defect, or have any effect upon it; nor did the failure of the petitioner to defend the *scire facias* change the case already made. That process did not take the place of the requisite garnishment notice, which is the original process in garnishment proceedings; but it is the regular writ to be resorted to under the statute, when a garnishee, duly served with written notice originally, fails to appear, and thereby permits conditional judgment to go against him. It is in no sense a substitute for the original process, and may without peril be ignored if there was no written notice in the first instance. Both the *scire facias* and the judgment thereon, like the conditional judgment on which they are based, are invalid, if in fact there was no original process, and no appearance and waiver in either instance.

The garnishee may make the same defense to the *scire facias* that he might have made to the original garnishment summons: *Hogshead v. Caruth*, 5 Yerg. 227; but he may disregard it altogether where there was no such summons in writing, as in the present case, and afterward supersede the execution.

It has been held that service of an attachment writ on a party proceeded against, and attempted to be sued as a garnishee, was not sufficient to bring such party before the court, and that the service of written garnishment notice was indispensable to the accomplishment of such a legal result: *Railroad v. Todd*, 11 Heisk. 556.

The law requiring written notice in such a case is the same as that applicable to this case.

Reverse and remand.

GARNISHMENT — RIGHT OF GARNISHEE TO ATTACK JUDGMENT. — The validity of a judgment against the defendant cannot be assailed by the garnishee of the defendant upon the ground that notice of the action was not duly served upon the defendant: *Schneitman v. Noble*, 75 Iowa, 120; 9 Am. St. Rep. 467, and note. See note to *Hanna v. Lauring*, 13 Am. Dec. 339, in which the defenses of a garnishee are discussed. A judgment rendered in an attachment suit cannot be collaterally attacked, and is conclusive until reversed or set aside in a direct action: *Azman v. Deuker*, 45 Kan. 179.

JUSTICE'S JUDGMENT RENDERED WITHOUT SERVICE OF PROCESS. — A judgment rendered by a justice of the peace without service of process upon the defendant, or his appearance, is void, and may be set aside by the circuit court upon a writ of *certiorari*: *Railway Co. v. Ryan*, 31 W. Va. 364; 13 Am. St. Rep. 865, and note discussing the validity of justices' judgments; *Segar v. Muskegon etc. Co.*, 81 Mich. 345. An irregular service of a justice's summons, without a voluntary appearance, will cause a judgment rendered thereon to be set aside on a writ of *certiorari*: *Letherby v. Shaver*, 73 Mich. 500.

BOYD v. INSURANCE COMPANY.

[90 TENNESSEE, 212.]

INSURANCE — FALSE STATEMENT CONCERNING OCCUPATION OF PREMISES AVOIDS POLICY. — The holder of a policy of insurance on a dwelling-house described in the policy as occupied by good tenants cannot recover for a loss, if such house was in fact vacant when the policy was issued. Such statement is a warranty; and to entitle the insured to recover, it must have been true, although it was made in ignorance, and without any desire to misrepresent any of the facts.

WAIVER OF WARRANTY OF OCCUPATION OF INSURED PREMISES, WHAT NECESSARY TO CONSTITUTE. — If a policy of insurance is void at its inception because it contains a warranty that the premises insured were occupied, when in fact they were vacant, a subsequent notice to the insurer that they were vacant at the time of the giving of the notice cannot give life to the policy; and the consent of the insurer to the vacancy will not constitute a waiver by him of the forfeiture caused by the premises not being occupied when the policy was issued, unless such consent was given with full notice of all the facts.

REFUSAL TO CHARGE ON POINT NOT INVOLVED IN EVIDENCE NOT ERROR. — It is not error for the court to refuse to charge the jury upon a point not involved in the evidence.

INSURANCE — REQUIREMENT OF PROOFS OF LOSS NOT WAIVER OF OTHER DEFENSES. — An insurer, by requiring proofs of loss stipulated for in the policy, does not waive his right to set up other defenses, although the insured may have incurred expense in furnishing the required proofs.

ACTION on insurance policy. The opinion states the facts.

Malone and Malone, for Boyd.

M. B. Trezevant, for the Insurance Company.

LURTON, J. This is an action at law upon a policy of fire insurance. The property insured is described on the face of the policy as a "one-story frame, shingle-roof dwelling-house, occupied by good tenants as such." This policy was issued March 9, 1888, and was for two years.

On January 31, 1889, the property was consumed by fire. The insurance company, among other pleas, plead that the premises were not occupied, either at time of issuance of policy or at time of loss. There was a judgment for the insurer. Errors are assigned upon the charge of the court to the jury. Among other things, the court charged as follows: "The statement in the policy in this case, 'on the one-story frame, shingle-roof dwelling-house, occupied by good tenants as such,' is a representation by the plaintiff to the defendant that at the time the policy was issued the building was really occupied, and the condition upon which the contract of insurance was based; and to entitle the plaintiff to recover, it must have been true. Therefore, if you find that the building was vacant, and that the defendant was ignorant of that fact, this avoids the policy, and your verdict should be for defendant. This is the law, even though the statement be made in ignorance, and without any desire to misrepresent any of the facts."

This was a succinct statement of the law, expressed in positive and unambiguous terms.

The distinction between a representation and a warranty in a policy of fire insurance is an important one, and has led to much conflict of judicial opinion. The definition by Mr. Arnold, in his work on insurance, of a warranty is, that a "warranty is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends."

This definition, says Mr. May, in his valuable work on insurance, has met with general acceptance. The latter author, speaking of a warranty, says: "By a warranty, the insured stipulates for the absolute truth of the statement made, and the strict compliance with some promised line of conduct, upon penalty of forfeiture of his right to recover in case of loss, should the statement prove untrue or the course of conduct be unfulfilled." Again, he says: "A warranty is an

agreement in the nature of a condition precedent, and, like that, it must be strictly complied with": May on Insurance, sec. 156.

A warranty enters into and is a part of the contract, and the materiality is not open to discussion. No liability can arise, except within the terms of the contract of which the warranty is a part. On the other hand, a mere representation is in its nature no part of the contract, being a statement incidental or collateral to the contract. Hence, if a representation be concerning a matter immaterial to the risk, it does not affect the contract: May on Insurance, secs. 183, 184.

If, however, the representation be of a fact material to the risk, and be relied upon by the insurer, it is the undoubted general rule that such representation, whether made intentionally or through mistake, and in good faith, avoids the policy. "It is the fact that the insurer relies upon the truth of the representation, and not upon the intention, which misleads, whether fraudulent or otherwise, that gives the right to complain": May on Insurance, sec. 181.

In view of the consequence resulting from the breach of a warranty, however immaterial, the courts will not favor a construction which will convert that which was incidental or collateral into a warranty. The intent that the statement or description shall be a part of the contract must arise upon a fair interpretation and clear intent of the words used. Whether the statement constitutes a warranty or a representation is a question of law, and is for the court. The rule that any statement or description on the face of the policy which relates to the risk is a warranty has been largely accepted: *Wall v. East River Mut. Ins. Co.*, 7 N. Y. 370.

It is enough, however, for the purposes of this case to say that where, on the face of the policy, the property is described as a dwelling-house occupied by tenants, that such a statement is a warranty. It is evident in such case that the property is insured as an occupied dwelling, and this fact becomes a part of the contract. To recover, the assured must bring himself within the terms of the contract upon which he sues: *Alexander v. Germania Fire Ins. Co.*, 66 N. Y. 464; 23 Am. Rep. 76.

The second assignment of error is upon the refusal of the court to charge the jury, that "if you find that the house was vacant at the time the policy was taken out, yet if you further find the fact to be, that this vacancy continued for some

time, that plaintiff Boyd notified the insurance company of the vacancy, when the insurance company, through its agent and secretary, said, 'That was all right,' or words to that effect, then this was a waiver of the forfeiture caused by the house not being occupied when the policy was issued, and on this point your verdict should be for the plaintiff."

The request is not explicit. If the notice to the secretary of the company was merely a notice that at the time of the notice there was a vacancy, this would not be notice that when issued the vacancy was then existing. The facts show that this house had not been occupied for nearly a month before issuance of policy, and that it continued vacant until burned, nearly a year afterward. During this time the unoccupied premises were used by wagoners and tramps as a temporary camping-place. The notice given the secretary was not earlier than November. To operate as an estoppel, the facts should have been fully and fairly stated. If, with such notice, the company consented to the continuance of the policy, or made no objection when informed of the facts, then it might be held as waiving all right to afterward complain of the non-occupation of the premises at the date of issuance or at date of loss.

This request leaves the extent of the notice to conjecture. A consent to a vacancy occurring during the life of the policy would not be a waiver of a warranty that the premises were occupied at inception of contract. Provision is made in the contract for a vacancy thus occurring, and the court had already charged concerning such a vacancy during life of the policy, "that if the defendant had notice of such vacancy of the house after it had been insured, and assented to its being vacant, this would be such a waiver of the forfeiture clause for vacancy as would entitle plaintiff to recover." Notice of such a vacancy and consent thereto would only operate to waive the clause of the policy forfeiting it for a vacancy without consent during life of the policy. This contract had never any validity, and life could not be given to it unless the company, with full notice, consented to its continuance. Good faith and fair dealing required that all the facts should have been stated. If, however, this request be regarded as requiring notice of the non-occupation at inception of the contract, then it was not error to refuse it, for the evidence of plaintiff as to what he said to the secretary does not show that he informed him of the non-occupation at issuance of

contract. What he said would leave the impression that he only spoke of a vacancy then existing, and his anticipation of an early occupancy. It is not error to refuse to charge upon a point not involved in the evidence.

The third and last assignment is upon the refusal of the court to charge that if after the loss and knowledge of the facts by the company a negotiation for a settlement of the loss was begun, "by which Boyd was required to go to expense and trouble in getting up an estimate of his loss, or of the value of the house destroyed," that this would operate as a waiver of the defenses heretofore considered. It was not error to refuse this. The company did not admit the amount of the loss, and claimed overinsurance in addition to the defenses growing out of breach of warranty of occupation. The policy required that the assured should furnish evidence of his loss, and if required, plans and specifications of the building destroyed. The requirement of such evidence, even if it did involve expense, is not a waiver of other defenses. The cases of *Insurance Co. v. Norton*, 96 U. S. 234, and *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, cited by counsel for appellant, were cases involving conduct after forfeiture, but before a loss had occurred. They do not support the assignment. The other cases cited are not accessible. It is inconceivable, though, that they should be authority for the position that if the insurer after a loss requires proof of loss, it thereby waives all right to set up as a defense that it is not liable by reason of the fact that it never had a valid contract at all. Waiver is generally but another term for estoppel. There can be no estoppel where the assured has not been misled to his prejudice. This defense was one to the whole demand. Its assertion might waive defects in proof, or want of notice, but the demand of estimates of loss in no way misled plaintiff, for he knew that not only was all liability denied, but that if any existed, the amount of his demand was contested.

The judgment must be affirmed.

INSURANCE — MISREPRESENTATIONS — EFFECT OF. — Where a policy of insurance recites that the building insured is occupied for stores below, such recital is an express warranty, which, if false at the time of issuing the policy, will operate to avoid it: *Stout v. City etc. Ins. Co.*, 79 Am. Dec. 539, and note; *Alexander v. Germania Ins. Co.*, 66 N. Y. 464; 23 Am. Rep. 76, and note. Where any of the material representations in a policy of fire insurance are false, they will operate to avoid the policy: *Rankin v. Amazon Ins. Co.*, 89 Cal. 203; 23 Am. St. Rep. 460. Warranties by an applicant for insurance will be strictly applied, and misstatements therein made innocently by mis-

take or inadvertence are fatal to the contract, but they will be strictly applied to the undertaking of the party making it: *Equitable etc. Ins. Co. v. Hazelwood*, 75 Tex. 338; 16 Am. St. Rep. 893. Where an insured makes a statement and declares it true, not knowing it to be true, he is, if it is false, guilty of a misrepresentation which will avoid his policy: *Clark v. Union Mut. Ins. Co.*, 40 N. H. 333; 77 Am. Dec. 721, and extended note. In order to avoid the policy, the misstatement must be an intentional one: *National Bank v. Union Ins. Co.*, 88 Cal. 497.

INSURANCE — WARRANTY — WAIVER, WHAT CONSTITUTES. — To constitute a waiver which will prevent the insurer from relying upon the terms of the policy, there must be some act which amounts to an estoppel: *Weidert v. State Ins. Co.*, 19 Or. 261; 20 Am. St. Rep. 809, and note; *Weed v. London etc. Ins. Co.*, 116 N. Y. 107; *Richards v. Continental Ins. Co.*, 83 Mich. 508.

KATZENBERGER v. LAWO.

[90 TENNESSEE, 235.]

RAILWAY COMPANY RUNNING CARS IN CITY STREETS BOUND TO OBSERVE STATUTORY PRECAUTIONS. — A railway company operating its trains over tracks lawfully laid in the streets of a city must comply with the statutory precautions for the prevention of accidents required to be observed by railroads.

RAILWAYS — DUMMY LINE IS RAILROAD. — A dummy line over which cars carrying passengers exclusively are drawn by small steam-engines called dummies is a railroad within the meaning of the statute prescribing the precautions to be observed by railroads.

MUNICIPAL ORDINANCE IN CONFLICT WITH GENERAL LAW OF STATE IS NULLITY. — A municipal ordinance which conflicts with the general law of the state is a nullity and of no authority. And where a general state law requires railroad companies to blow a whistle when a person or animal appears on the road, such companies are not excused from the performance of this statutory duty within the boundary of a municipality whose ordinance makes the blowing of such whistle a misdemeanor.

ACTION for personal injuries. The opinion states the case.

Gantt and Paterson, for Katzenberger.

T. W. and R. G. Brown, and Bolton Smith, for Lawo.

LURTON, J. By a collision on one of the streets of Memphis between a wagon driven by Lawo and a dummy train of street-cars, he sustained such bodily injuries as have resulted in a judgment for three thousand dollars against plaintiff in error, who, as receiver, was operating the railway at the time.

The circuit judge charged the jury that the statutory precautions required to be observed by railroads, and contained in subsection 4 of section 1166, Code of Tennessee, applied to the movement of all railway trains upon the streets of Memphis

and that a dummy line was a railroad within the meaning of this provision.

Each of these propositions has been assigned as error.

Counsel have urged very forcefully that when, by legislative and municipal consent, a railway has been laid longitudinally upon the streets of a city, that it is not practical to observe the requirements of the statute in reference to stopping the train whenever any person, animal, or other obstruction appears upon the road; that under such circumstances a railway is lawfully upon the street, and that to construe the statute as applicable when thus upon the streets will prevent the movement of trains, inasmuch as at all times persons and animals or other obstructions will be upon the road and within observation of the lookout upon the locomotive.

The statute was enacted for the purpose of preventing accidents. It prescribes precautions which, so far as they relate to the duty of watching the track, and the duty of avoiding collision with persons or animals on the track, are identical with the common-law duty of diligence: *Patton v. Railway Co.*, 89 Tenn. 370; *Railroad v. Pratt*, 85 Tenn. 13.

If these precautions are observed, the statute relieves the company of responsibility. If it fails to observe them, the statute imposes liability. All other questions out of the way, the rule would be the same, regardless of the statute. With respect to the burden of proof, and the effect of contributory negligence, the statute changes the rule of the common law.

If there be any strength in this argument, it would practically repeal the statute; for the same difficulty in literally observing it will be found to exist between country stations, the track in the daytime being very generally used as a walkway. Practically, it is unnecessary to stop the train when an object appears on the track, save in a very few instances. The statute only requires it when necessary, and experience demonstrates that this necessity seldom arises. The track is generally cleared by signals, and no liability arises from failure to stop, unless such failure has resulted in an accident. What the common law would impose as ordinary care when necessary to avoid injury to the property of another, or an accident to a person upon the track, is not so difficult of accomplishment when embodied in legislation as to authorize a construction suspending it when the necessity for its observance is most necessary.

When a railroad is longitudinally upon the streets of a city,

the danger of accidents is obviously increased. Under such circumstances there should be a corresponding increase of diligence. The railway is upon the street of its own volition. The economical acquisition of the right of way has been regarded as of greater benefit than the dangers incident to a road so placed. But the use of the street by the railway is not exclusive. The public have equal rights. To say that under such circumstances the statute should be held inoperative, would be to say that the legislature intended that it should not apply just where the probability of accident is greatest. It will doubtless be found necessary, where a road is upon the street of a city, to so regulate the speed that the train can be stopped within a short distance in case of necessity.

A train pulled by a small engine called a dummy, although exclusively engaged in carrying passengers, is a railroad within the meaning of the statute prescribing precautions to be observed by railroads. The evil intended to be remedied pertains as much to this sort of railway as to the ordinary railroad of commerce. In the case of *Street R'y Co. v. Doyle*, 88 Tenn. 747, 17 Am. St. Rep. 933, we had occasion to consider the resemblance and difference between the dummy line and the commercial railway. For the reasons there stated, we think the statutory precautions against railroad accidents apply to dummy lines, whether run within or without the limits of a municipality.

The third assignment of error is for the refusal of the court to charge the jury that, under the ordinances of the city of Memphis, the blowing of a whistle by a railway engine was a misdemeanor, and that therefore the statutory precaution of blowing the whistle when a person or animal appeared on the road need not be observed within the city limits. There was no error in this. By the act creating the present government in force in the city of Memphis, power was given the municipality "to permit and regulate the laying of railroad tracks of iron, and the passage of railroad cars through the taxing district, and to remove such railroad track if it obstructs travel, or does not conform to the laws of the taxing district; and to make all suitable and proper regulations in regard to the use of the streets for street-cars, and to regulate the running of the same so as to prevent injury or inconvenience to the public": Acts 1879, c. 84, p. 100.

Under this authority the municipality has enacted an

ordinance regulating the running of trains through the city. It seems wise and salutary in the main. Among other things prohibited is the blowing of the steam-whistle. In place of this the bell is required to be rung, and watchmen are required to be stationed at street crossings. The ordinances of this municipality are of no authority where they conflict with the general law of the state. So far as this ordinance conflicts with the Code, section 1166, prescribing precautions against accidents, this ordinance is a nullity.

The authority given in the act creating the taxing district, and which we have quoted, gives no authority to suspend, alter, or change the general statutes of the state regulating the running of railroad trains. To support the contention of counsel as to this last request, we have been referred to Patterson on Railway Accident Law. This author does say, concerning statutory signals, that "of course the railway may excuse its non-performance of the statutory duty by showing that the duty was, on the particular occasion, omitted within the boundary of a municipality whose ordinances, lawfully enacted, forbade the giving of signals within its limits": Sec. 163.

The author cites the case of *Pennsylvania Co. v. Hensil*, 70 Ind. 569; 36 Am. Rep. 188. This case seems to support the text. But on looking to the Code of Indiana, regulating the giving of signals at road crossings, it is found that the act provides "that nothing therein contained shall be so construed as to interfere with any ordinance or by-law that has been or may be passed by any city or town regulating the management or running of engines or trains within such city or town": Code of Indiana, 1881, sec. 2178.

We have no such exception made in our statute. The other request refused had been substantially given, and the fifth assignment is overruled.

Judgment affirmed.

RAILROADS — VIOLATION OF ORDINANCE AS EVIDENCE OF NEGLIGENCE. — In an action to recover for injuries by being struck by a train running through the streets of a city, proof that it was running at a rate of speed prohibited by municipal ordinance is evidence of negligence: *McMarshall v. Chicago etc. R'y Co.*, 80 Iowa, 757; 20 Am. St. Rep. 445. It is negligence *per se* for a cable-railway company to run its cars through the streets of a city at a rate of speed prohibited by ordinance: *Weber v. Kansas City etc. R'y Co.*, 100 Mo. 194; 18 Am. St. Rep. 541, and note.

RAILROADS — STREET-RAILROADS — WHAT ARE. — A railroad constructed by public authority upon the streets of a city and propelled by a steam

dummy-engine is a street-railroad: *Street Railway Co. v. Doyle*, 88 Tenn. 747; 17 Am. St. Rep. 933, and note.

MUNICIPAL CORPORATIONS — ORDINANCES. — An ordinance not authorized under a general authority to pass ordinances, and in conflict with the same, is void: *State v. Webber*, 107 N. C. 962; 22 Am. St. Rep. 920. The ordinances of a municipal corporation must not be inconsistent with the laws of the state: *Anderson v. Wellington*, 40 Kan. 173; 10 Am. St. Rep. 175, and note. A municipal ordinance discriminating against non-residents is unconstitutional and void: *State v. Orange*, 50 N. J. L. 389; *Fesheimer v. Louisville*, 84 Ky. 306.

INSURANCE COMPANY v. BENNETT.

[90 TENNESSEE, 256.]

LIFE INSURANCE — PRESUMPTION AGAINST SUICIDE AND MURDER IN CASE OF VIOLENT DEATH OF INSURED. — In an action on a policy of life insurance, where the violent death of the insured is proved, but there is no direct proof of the manner of his death, the presumption of law is, that he did not commit suicide, and was not murdered; but either of these presumptions may be overcome by facts and circumstances which establish the contrary.

EVIDENCE TO BE CONSIDERED IN DETERMINING WHAT FACTS ARE PROVEN. — In determining what facts are proved in a case, the jury should carefully consider all the evidence given, with all the circumstances of the subject-matter of the inquiry as detailed by the witnesses.

LIFE INSURANCE POLICY — CLAUSE IN, REQUIRING DIRECT AND POSITIVE PROOF OF CAUSE OF DEATH, HOW CONSTRUED. — In construing a clause in a policy of life insurance which provides that "the insurance shall not be held to extend to any cause of death, the nature, cause, or manner of which is unknown or incapable of direct and positive proof," the court may, in a case where there is circumstantial, but no direct, evidence of the manner of the death of the insured, charge the jury that they may find any fact proven which may rightfully and reasonably be inferred from the evidence.

LIFE INSURANCE POLICY — "ACCIDENTAL MEANS" OF DEATH WITHIN MEANING OF CLAUSE IN. — Where a policy of life insurance does not contain a provision in terms against a claim under the policy if the death was caused by intentional injury inflicted by the insured or any other person, but contains merely a provision that the policy only covers injuries effected through "accidental means," an injury not anticipated, and not naturally to be expected, by the insured, though intentionally inflicted by another, is an accidental injury within the meaning of the contract.

LIFE INSURANCE POLICY, CLAUSE IN, EXEMPTING FROM LIABILITY IF INSURED KILLED IN QUARREL, HOW CONSTRUED. — A clause in a policy of life insurance providing that "if death occurs from assault provoked by quarreling, no recovery can be had," must have a reasonable construction, and the death of the insured cannot be regarded as coming within its meaning, unless it occurred as the result of a quarrel provoked by himself, and of so serious a nature that he might reasonably have expected that anger would be thereby aroused, and injury inflicted. It

is not every frivolous controversy that is a quarrel within the meaning of such a clause.

LIFE INSURANCE POLICY, CLAUSE IN, EXEMPTING FROM LIABILITY FOR INJURY FROM UNLAWFUL ACT, HOW CONSTRUED. — A provision in a policy of life insurance exempting the insurer from liability for injuries to the insured while engaged in or in consequence of some unlawful act does not extend to exempt the insurer from liability because of the infraction of law by the insured, when the act has no connection with the injury, or when the act is in violation of some obligation of morality or rule of policy not recognized or adopted as law. Living in fornication is not an unlawful act, unless it is accompanied with circumstances of notoriety or publicity; and the fact that the insured was so living at the time of his death does not exempt the insurer from liability under this clause.

ACTION on a policy of life insurance. The opinion states the case.

Taylor and Carroll, for the Insurance Company.

L. and E. Lehman, for Bennett.

SNODGRASS, J. Action on accident insurance policy for five thousand dollars issued by plaintiff in error on life of A. Bennett; trial before a jury; verdict and judgment in favor of plaintiff for amount of policy and interest; appeal and assignment of errors by defendant.

Bennett was found dead in a house on Causey Street, Memphis, Tennessee, about ten o'clock, A. M., on March 31, 1886. He had been dead apparently about a half-hour, the body being still warm. The house contained three rooms, — the front, a bedroom; the middle, a dining-room; and a back room, applied to no special purpose so far as the evidence discloses, but having a place of exit, a door, opening into a back yard and by an alley. Entering the dining-room from the front, the door was on the left side of the room, and it was in line with and directly opposite the door between that and the back room and the back door mentioned.

Bennett was found lying between the two doors in the back room, dead, with a pistol-shot through his heart. Neither his flesh nor clothing was powder-burned. His hat and umbrella were lying near him.

In the dining-room opposite, mortally wounded, and speechless it would seem from absence of any effort to prove that she ever spoke after found, was a woman known as Ida Bennett, with whom Bennett is shown to have had illicit relations, and who had been occupying the house. Her flesh and clothing were powder-burned, and she had a pistol-shot wound in

the right side, of **which** she subsequently died. Near her, toward the front of the house (she lying rather across the space between the two doors of the dining-room), was found a six-shooting pistol, but whether loaded or unloaded does not appear, nor does it appear whether the wounds made in the two bodies were made by this, or even of a pistol carrying the same sized ball.

In relation to Bennett's connection with the woman, and the house in which both were found dead and wounded, it was shown that he had some time before met her at a house of ill-fame; that she subsequently became his mistress, and lived with him as such,—whether this was open and notorious does not appear; that the day before the killing, Bennett, who had been away from the city for some time, returned to it, and asked a friend how this woman had been conducting herself while he was away, and whether she had been true to him, expressing himself as tired of her and intending to break up his relations with her, and saying that when she went home next summer to see her people that she should remain there, and that would be the end of their relations; said he wanted to quit her because his relations with her were bringing him into disrepute, and that when he met his young lady acquaintances he could not look them in the face.

The witness who gave this evidence testified that Bennett was a peaceable, quiet, timid man, and had a good reputation for peace; that Bennett did not intimate that he had used any violence toward the woman, and the witness stated no fact or declaration from which an intention to do so could be inferred.

This, so far as appears, was the last time Bennett was seen by any living witness until he was discovered dead; and it is upon the facts and circumstances thus stated that the verdict and judgment are based. The objections to the judgment will be considered, as near as possible, in the order of the assignment of errors.

The first of this assignment is, that the court erroneously charged: "The presumption of law is, that Bennett did not commit suicide, and was not murdered." The court did so charge, adding, however, that "either of these presumptions may be overcome by facts and circumstances which establish the contrary"; and elsewhere saying to the jury: "In determining what facts are proven in the case, you should carefully consider all the evidence given, with all the cir-

cumstances of the subject-matter of the inquiry as detailed by the witnesses."

The charge was a correct statement of the law: *Mallory v. Travelers Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410; *Travelers Ins. Co. v. McConkey*, 127 U. S. 661.

It is argued that this application of the law is erroneous, because deceased must have either killed himself or been killed by the woman, in view of the circumstances detailed. But this does not follow. Both may have been killed by another or others. There is a great probability that one may have shot the other, and then himself or herself, — the latter is most probable, — but there is no presumption of such fact, and the presumptions were as stated by the circuit judge.

The second error assigned is, that the court charged: "The jury may find any fact proven which may rightfully and reasonably be inferred from the evidence."

The exception is based upon a condition of the policy that "the insurance shall not be held to extend to any case of death, the nature, cause, or manner of which is unknown, or incapable of direct and positive proof."

But the charge was not in contravention of law nor of the terms of the contract. The requirement of direct and positive proof of the nature, cause, or manner of death did not make it necessary to establish the fact and attendant circumstances of death by persons actually present when the insured received the injury which caused his death. The two principal facts to be established were external violence and accidental means producing death. The first was established when it appeared that death ensued from a pistol-shot wound through the heart of deceased. The evidence on that point was direct and positive, as much so as if it had come from one who saw the pistol fired; and the proof on this point was none the less direct and positive because supplemented or strengthened by evidence of a circumstantial character: *Travelers Ins. Co. v. McConkey*, 127 U. S. 631; or, we add, of an inferential or presumptive character.

The question as to "accidental means" of death necessary to be shown will be considered under the fifth assignment of error in this connection, where it most properly falls, and which arises upon refusal of the circuit judge to charge, as requested, that "if the jury find from the evidence that Bennett died from a pistol-shot wound, received at the hands of a

person who intended to kill him, the plaintiff cannot recover," based upon a provision in the policy that only covers injuries effected by external, violent, and accidental means, and argument that if the killing was intentional on the part of the person shooting him, it was not accidental within the meaning of the policy.

It may be remarked, in the first place, that there being no evidence of an intentional killing, and no presumption of it, the court was not required to give this charge; but, passing that, we are of opinion that where, as in this case, there was no provision in terms against a claim under the policy if the death was caused by intentional injury inflicted by the insured or any other person (as was the condition of the policy considered in the McConkey case cited, and the Hutchcraft case to be cited), but merely a provision that the policy only covered injuries effected through "accidental means," then an injury not anticipated, and not naturally to be expected by the insured, though intentionally inflicted by another, is an accidental injury within the meaning of the contract. We content ourselves with citing the authorities on this point without repeating the discussion there indulged: 1 Am. & Eng. Ency. of Law, 88, 89, and notes; *Supreme Council v. Garrigus*, 104 Ind. 133; 54 Am. Rep. 298; *Hutchcraft v. Travelers Ins. Co.*, 87 Ky. 300; 12 Am. St. Rep. 484.

There are cases in which it is assumed the contrary view is taken; but, so far as we have found on examination, the decisions are put upon provisions against liability where insured is intentionally killed by another. They are not to be extended, and are not in conflict with those cited, which, we hold, state the true rule: See Am. Law Reg., Jan. 1889, pp. 42-56.

These authorities and the views announced on the assignments discussed, dispose of the fourth and sixth assignments, and they need not be further noticed.

The third assignment is, that the court erred in charging that "if the jury finds from the evidence that Bennett died from a pistol-shot wound received from a pistol in the hands of a person who intended to wound or kill him, brought about by a quarrel which he provoked, and from which he might reasonably expect bodily injury, then the plaintiff cannot recover; and on the other hand, if he could not reasonably have expected anger to be provoked, and injury therefrom, then he can recover.

The exception to this charge is, that the "policy provides, in distinct terms," that "if death occurs from assault provoked by quarreling no recovery can be had," and that the circuit judge misled the jury by stating the proposition with the qualification attached as indicated.

As to this, we say, that inasmuch as there was no evidence of any quarrel, provoked by him or unprovoked, and none from which one may necessarily be inferred, it does not appear that plaintiff in error was injured by this charge, if erroneous. But if the evidence that the insured was tired of this woman, and intended to get rid of her, and terminate his relations with her (an event to have been postponed until the ensuing summer, according to the testimony), in connection with the circumstances and surroundings of the parties in life and death, be sufficient to justify the assumption that there might have been a quarrel between them at the time of the killing, and the charge therefore pertinent, and if erroneous, and injurious to defendant, we may properly determine its correctness or incorrectness; and we are of opinion that it was not erroneous.

Such a provision must have a reasonable construction. It cannot be held to mean that every frivolous controversy which might in some sense be termed a "quarrel," although it was not a dispute or quarrel from which the insured might reasonably have expected anger to be provoked or injury to result, is within the meaning of the term used in the policy. There being no evidence of a quarrel in fact with any one, and the only apparent probability of such a thing having occurred being that some dispute, trivial or serious, with this woman might have happened, the circuit judge seems to have addressed himself to this possibility, and, in substance and effect, to have said: If you believe deceased provoked such a serious quarrel with her as that he might reasonably have expected bodily injury, then plaintiff cannot recover; but you are not to refuse to find in favor of plaintiff merely because the woman may have provoked a quarrel with the insured and then killed him, or he provoked a frivolous or seemingly safe dispute with her, — a quarrel of a nature in which he could not reasonably have expected anger to be provoked and injury therefrom, and was killed by her, having no reason to anticipate violence. We think this a sound construction of the law of the contract as applied to the facts of the case.

The seventh assignment of error is not well taken. It is

upon the refusal of the court to charge, as requested, that "if the jury finds that deceased, Bennett, and the woman were living together in a state of fornication, and that Bennett was killed in consequence of and while that relation continued, there can be no recovery under the policy, because the insurance does not extend to or cover injuries received while engaged in or in consequence of any unlawful act."

In this connection it is averred in the assignment that fornication is an unlawful act, and the policy is correctly stated to provide that no recovery can be had upon it when the injury may have happened while the insured was engaged in or in consequence of some unlawful act.

A complete answer to this is, that it states no legal proposition. Fornication, or "living in a state of fornication," however immoral and wrong, must be accompanied with circumstances of notoriety or publicity, to make it an unlawful act. The law takes no cognizance of the offense until it becomes open and notorious lewdness: *Brooks v. State*, 2 Yerg. 482; *State v. Moore*, 1 Swan, 136; *Mynatt v. State*, 8 Lea, 47.

Such a cohabitation, therefore, only becomes a recognized unlawful act when it is open and notorious, and of this there was no assumption in the request or proof in the record.

But again, passing this question, if it were true that such association *per se* was an unlawful act, it would not follow that plaintiff could not recover. In order to defeat a recovery because of such provision, there must appear a connecting link between the unlawful act and the death. It is not sufficient that there was an unlawful act committed by the insured, and that death occurred during the time he was engaged in its commission. There must be some causative connection between the act which constituted the violation of the law and the death of the insured: *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478; 49 Am. Rep. 469.

Illustrating, it is aptly said in the same case: "Suppose a man violates the law against profanity and is shot while so doing, should that absolve the company from liability?" And see, to same effect, *Bradley v. Mutual B. L. Ins. Co.*, 45 N. Y. 432; 6 Am. Rep. 115; *Cluff v. Mutual B. L. Ins. Co.*, 13 Allen, 308.

Numerous illustrations of similar character might be presented in which the act, however unlawful, has no relation to the death as its cause or contributing element, but they need not be multiplied. There is no pretense that the death

was caused directly by any such unlawful act of deceased, or resulted as a natural consequence thereof. Nor does it appear from the evidence that he was engaged in any act from which danger, much less death, might have been expected.

The provision of the policy excluding liability for injury received by the insured while committing an unlawful act refers to such injuries as may happen as the necessary or natural consequences of the act, — as its probable and to be anticipated consequences; and the reference to injuries received “in consequence of any unlawful act” is to those injuries which arise out of or flow naturally from the act committed as its effect or resulting consequence. Attempts to murder a particular individual, in which lawful resistance or consequent punishment may cause or occasion death; attempts to murder or injure or rob the wife or child or parent of another, in which injury might be expected from defense of that other; submitting to an operation for abortion; engaging in a horse-race, where horse-racing is unlawful, and where the injury results during the race, or in the effort to stop one of the horses in its progress, and the like, — are acts falling within the terms of the policy, and illustrate what is meant by “injuries received while insured is engaged in or in consequence of an unlawful act”: *Cluff v. Mutual B. L. Ins. Co.*, 13 Allen, 308; *Hatch v. Mutual Life Ins. Co.*, 120 Mass. 550; 21 Am. Rep. 541; *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478; 49 Am. Rep. 469; *Insurance Co. v. Seaver*, 19 Wall. 531.

The law, we hold, is properly and well settled that such provision does not extend to exempt the insurer from liability because of the infraction by the insured of law when the act has no connection with the injury, or when the act is in violation of some obligation of morality or rule of policy not recognized or adopted as law. It has been held, too, that the unlawful act committed must be criminal, and not a mere violation of a civil right, or infraction of a law not criminal: *Adams v. Cowles*, 95 Mo. 506; *Cluff v. Mutual B. L. Ins. Co.*, 13 Allen, 308; *Bradley v. Mutual B. L. Ins. Co.*, 45 N. Y. 432; 6 Am. Rep. 115.

The contrary has been held so far as it relates to the violation of a positive rule of civil law, which proximately leads to the injury, when it is such an act as increased the risk and naturally led to the death: *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478; 49 Am. Rep. 469. But how this is we need not

decide. It is sufficient to say the act alleged does not fall within the terms of the policy, for reasons stated.

The eighth and last assignment of error embraces those stated and generally that the verdict is against the evidence.

We hold the contrary, and the judgment is affirmed, with cost.

IN THE CASE OF *Persons v. State*, 90 Tenn. 291, 295, Turney, C. J., who delivered the opinion of the court, citing the principal case, said: "In civil cases, where one has been found dead, even with marks of violence, nothing else appearing, the presumption is, that deceased did not commit suicide, as also that he or she was not murdered."

ACCIDENT INSURANCE — SUICIDE — PRESUMPTION AGAINST. — Where it appears that the death of the assured was caused either from accidental means or suicide, the presumption is against suicide: *Mallory v. Travelers Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410, and note; *Dennis v. Union Mut. etc. Ins. Co.*, 84 Cal. 570.

ACCIDENT INSURANCE — CLAUSE IN POLICY REQUIRING DIRECT AND POSITIVE PROOF OF DEATH — CONSTRUCTION OF. — A clause in a policy of insurance requiring direct or positive proof that the death of the assured was caused by external, violent means, and was not the result of design on the part of the assured or any other person, cannot be allowed to stand as a rule of evidence: Courts will not permit such stipulation as would defeat the ends to be accomplished by a trial: *Utter v. Travelers Ins. Co.*, 65 Mich. 545; 8 Am. St. Rep. 913, and note. See *Richards v. Travelers Ins. Co.*, 89 Cal. 170; 23 Am. St. Rep. 455; *Coburn v. Travelers Ins. Co.*, 145 Mass. 226.

ACCIDENT INSURANCE — ACCIDENTAL MEANS OF DEATH WITHIN A POLICY OF. — The word "accident" is construed to include a casualty, or something out of the usual course of events which happens without any design on the part of the person injured: *Richards v. Travelers Ins. Co.*, 89 Cal. 170; 23 Am. St. Rep. 455, and note.

ACCIDENT INSURANCE — CLAUSE IN POLICY EXEMPTING FROM LIABILITY FOR INJURY FROM UNLAWFUL ACT — HOW CONSTRUED. — An answer that the assured was injured by the intentional act of another while in a personal altercation states a good defense: *Travelers Ins. Co. v. McCarthy*, 15 Col. 351; 22 Am. St. Rep. 410, and note. See note to *Kerr v. Minnesota etc. Ass'n*, 12 Am. St. Rep. 637, with cases collected on this subject.

RAILWAY COMPANY v. WILSON.

[90 TENNESSEE, 271.]

RAILWAY COMPANY RUNNING TRAINS IN CITY STREETS MUST OBSERVE STATUTORY PRECAUTIONS. — A railway company running its trains over tracks laid in the streets of a city must observe the precautions, to prevent accidents, required by the statute.

RAILWAY COMPANY RUNNING TRAIN WITH ENGINE IN REAR LIABLE FOR NOT OBSERVING STATUTORY PRECAUTIONS. — A railway company that runs its trains with the engine in the rear, and which cannot, for that reason, observe the precautions against accidents required by the stat-

ute, is liable for injury inflicted by its trains while being run in that manner. The statute contemplates the running of trains with the engine in front, but the company is not relieved from its statutory liability by changing the engine to the rear.

CORRECT JUDGMENT AFFIRMED, THOUGH RENDERED ON INSUFFICIENT GROUNDS. — A judgment, if correct, will be affirmed, although it was rendered upon grounds that were insufficient.

ACTION for personal injuries. The opinion states the case.

W. G. Weatherford, for the Railway Company.

John H. Watkins, for Wilson.

SNODGRASS, J. The defendant in error recovered judgment against the Little Rock and Memphis Railroad Company for fifteen hundred dollars damages for injuries sustained while drunk and asleep on its track in Fulton Street, Memphis, Tennessee.

The accident occurred at a point about thirty yards north of Market Street, during the night of October 10, 1889, and while the employees of the company were, by means of an engine in the rear of a train of nine cars, pushing the train into the company's yard south of Market Street. The front car of this train ran over Wilson, causing the loss of one arm and partial loss of the other.

By consent of parties, a jury was waived, and the case tried by Hon. W. D. Beard, sitting as special judge in place of Judge Estes, who was incompetent. His finding of law and facts, and judgment thereon, were reduced to writing, and so given on demand of parties. They are, in substance and effect, that the railroad company was guilty of negligence, which proximately caused the injury, in failing to keep a lookout at some place on the front car of the train, or on the ground, either in front of the car or on the side, and so near the road that he could command a view of the road-bed in front of the moving train; that a lookout so placed could have discovered Wilson in time to have prevented the accident, notwithstanding Wilson's negligence in being there; and so the company was responsible for failure to take this precaution, which he held evidenced a lack of reasonable care and prudence.

The plaintiff's negligence was considered in mitigation of damages, and recovery only to amount stated was allowed. The railroad company appealed, and assigned errors. It is not necessary to state them in detail, because the determination of one question settles them all, so far as they relate to

the judgment on the merits; but there is a preliminary one proper to be noticed. It is, that the court erred in sustaining a demurrer to the second plea, because the declaration shows the accident occurred within the limits of the city of Memphis, and therefore the statute to prevent accidents on railroads (Milliken and Ventrees's Code, sec. 1298) does not apply. This is an erroneous assumption. We have held, in a case at this term, the contrary of this proposition. We repeat the holding here, but content ourselves by a reference to that case, without repetition of its argument: *Katzenberger v. Lawo*, 90 Tenn. 235; *ante*, p. 685.

The material question indicated as determining all others involved in the assignment of errors is, whether the statute applies to a train in which the engine is in the rear, the argument upon this being, that the statute provides that the lookout shall be upon the locomotive ahead, and only contemplates the placing of a lookout ahead when the locomotive is leading instead of following the train; and this appears to have been the view of the circuit judge, because he did not predicate the liability of the defendant upon the failure to observe the statutory precautions, but upon the non-observance of the common-law duty to exercise reasonable care and prudence.

There is, of course, a manifest difference in the situation as respects the view taken of the law to be applied. If the railroad company was liable for failure to observe statutory precautions at all, the burden of proof is on it to show that it did observe them: Code, sec. 1300; and if it fails to show this, it is liable (Code, sec. 1299), notwithstanding the negligence of the injured party, which can only go in mitigation. If, however, it was not a case in which the statutory precautions were required to be observed, because of the situation or order of arrangement of the train, then defendant's negligence would have to be shown, and plaintiff's might be considered in bar of the action, as at common law,—about the only difference which our statute occasions, for we have repeatedly held that its precautions suggested were only those indicated by the wisdom and prudent requirements of the common law in cases where the statute is now applicable. In those cases, however, where it is not applicable, the *onus* of proof remains as it was, and the effect of contributory negligence continues the same as it was at common law. But it is obvious, as has been often held, that if the court applied the right rule of law,

it is immaterial upon what consideration it was done. If, then, in fact, the statute applied, the ruling of the circuit judge was right, to the effect that the plaintiff's negligence did not bar the action, and we must therefore determine that question.

The argument that the statute does not apply because the engine was in the rear of the train instead of in front, and that consequently a lookout ahead on the locomotive is dispensed with, proceeds upon the erroneous assumption that if the railroad company, for convenience or otherwise, takes the engine from the front end of a train, and uses it in the rear, or at some other place in the train, a lookout is dispensed with in front. This is manifest when we look to the object of the statute. It contemplates an engine in front, with perfect head-light, a bell to be rung, and machinery for blowing the whistle, reversing the engine, and taking the precautions indicated in the special and general terms of the statute, including, of course, a place for the lookout to be, and an engineer, fireman, or some other person, always there as a lookout. Now, in case the engine had been in front, and its head-light or its machinery for alarm or stopping taken away from it, or the lookout taken off of it, it would not be denied that the company was liable; but because the company had taken, not one, but all, of these things away, the argument is, that it escapes statutory liability. Thus stated, it seems perfectly manifest that the proposition is erroneous. Putting it in other words, it is, that although the railroad company could not take away any one of these and avoid liability, it could take them all away and do so. That the whole includes all of its parts is a proposition not more axiomatic than that all the parts are necessary to make up the whole.

If, therefore, observance of the statute as a whole consists in "keeping an engineer, fireman, or other person upon the locomotive always upon the lookout ahead," in order that objects appearing on the track may be discovered, and the other precautions taken for which the statute provides, it follows that all these things are necessary to be severally done, in order that the whole requirement be complied with. The lookout must be kept ahead on the locomotive, and the locomotive must, of course, be kept there for him to be upon, or he cannot be upon it, and kept in the place required. The keeping of the locomotive there, therefore, is one of the parts of the observance, like all others, absolutely essential to consti-

tute the whole observance. And the same is true as to other things not specifically mentioned as included within the purpose of the statute, and which by construction have been held essential, as a head-light for night use on running trains. So of those things mentioned in the statute and properly belonging to the engine, and parts of its machinery, as the whistle and bell. These must be ahead or in front of the train, because it is not contemplated that collisions will occur in the rear. Nor would the statute be met by having a light and a lookout in front while the engine is in the rear. The statute intends, not a lookout as a formal matter, but a lookout on the locomotive in front, and the machinery and appliances on it at hand, and in immediate control, so that as soon as an object appears, the observance of it, and the attempts to avoid collision, may be prompt and immediate; for, in the great majority of cases they must be so if they serve any purpose. To have a lookout with a lantern in front, watching in a dim light for an obstruction which could be seen only a few feet off, and then signaling an engineer in the rear to ring a bell or blow a whistle far away from the object, and take such precautions as could be then and there done to avoid an accident, would be practically to provide for accidents instead of against them. The man with the lantern could see, at best, but a short distance; the engineer must take some little time to observe his signal; then, when he does so, if he rings the bell or causes the whistle to be sounded, he is at a greater distance from the object, and alarms may not therefore be so well heard, or understood, or appreciated. In this case the engine was 270 feet from the front of the train. The statute, in making the engineer, or fireman, or some other person on the locomotive represent a lookout, manifestly contemplates looking, alarming, and acting as practically contemporaneous. It is no more contemplated that the engine, therefore, should be in the rear than that the lookout should. Both must be in front if the statute is complied with.

It may be argued that this is inconvenient; that a railroad company must sometimes back its trains on its track. This may be entirely true, but it proves nothing. The company can do all its running that way if it prefers; the statute does not prohibit it absolutely and at all events. The statute merely makes it liable for any injury inflicted while doing so. If, for reasons of convenience or economy, the company prefers to take the risk, it may do so; but it cannot complain

that it suffers the legal consequences of the risk thus taken. Of course, it can reduce the risk to a minimum by keeping some one in front of the train, and warning off or actually removing obstructions. If it prevents injury, it prevents loss; but this it must do if it avoids the consequences of disregarding the statute. Nothing else will answer.

In the present case the company elected to attempt the running of the train in a street without observing the statutory precautions, but in the observance of others which it deemed sufficient. These, however, proved insufficient, and plaintiff's injury was the result of that election and misjudgment. His recovery was the legal consequence. It was made small by properly considering his contributory negligence, and there is nothing in its amount or otherwise of which the defendant can complain.

Let the judgment be affirmed, with cost.

RAILROADS — DUTY TO OBSERVE STATUTORY REQUIREMENTS. — A railroad operating its trains through the streets of a city must comply with the statutory requirements to prevent accidents: *Katzenberger v. Lawo*, 90 Tenn. 235; *ante*, p. 681, and note.

COLLIER v. MURPHY.

[90 TENNESSEE, 300.]

EXEMPTIONS — WAGES EXEMPTED NOT LIABLE TO SET-OFF WHEN. — Laborers' wages to the amount of thirty dollars are exempt by the statute, and cannot be subjected to a set-off by a claim in no way springing out of the contract relations between the parties, but arising out of a distinct and independent transaction.

EXEMPTION STATUTES ARE LIBERALLY CONSTRUED in favor of debtors.

ACTION for wages. The opinion states the case.

J. M. Troutt, for Collier.

Caruthers and Mallory, for Murphy.

LURTON, J. Plaintiff in error brought suit for wages due him as a laborer, the amount claimed being less than thirty dollars. Defendant, after this debt was created, but before suit, took an assignment of a judgment in favor of N. P. McChesney, and against the plaintiff, Collier, and relied upon same as a set-off under section 3628, Milliken and Ventrees's Code. Plaintiff insisted that, under the act of 1871 (inserted as section 3931, Milliken and Ventrees's Code), the wages due him were exempt from execution, attachment, or garnishment,

and that his debt was not, therefore, subject to be set off by a claim in no way springing out of his contract relation with defendant. This objection was overruled, and defendant allowed to rely upon the McChesney judgment as a set-off against the wages due to plaintiff. This ruling was based upon section 3628 of the code, which provides: "The defendant may plead, by way of set-off or cross-action, — 1. Mutual demands held by the defendant against the plaintiff at the time of action brought, and matured when offered in set-off."

This provision must, however, be construed with reference to the act of 1871, whereby thirty dollars of the wages of every mechanic and laborer is exempted from "execution, attachment, or garnishment." Exemption statutes are entitled to a liberal construction. The manifest purpose of the legislature was to exempt this amount of wages from any kind of coercive process of the law. If such a demand cannot be reached by attachment or execution or garnishment, is it a claim subject to be set off by a claim or demand in no way springing out of the contract under which the wages were earned? We think the exemption laws cannot be defeated by such a construction of the statute concerning set-offs. The case is much like that of *Duff v. Wells*, 7 Heisk. 17.

While the language used in the act of 1871, strictly construed, would protect such wages only from "execution, attachment, or garnishment," yet the whole spirit of the act is such that we think this claim was not subject to any manner of legal seizure. "Seizure" is a word often used in our exemption laws, and this word has been used by the editors of the last revision of our code as fairly construing the force and meaning of this exemption of wages. While we must look to the original act when any doubt arises as to the correctness of this revisal, yet the word as used by the revisors expresses very fully what we take to be included within the meaning of the act of 1871. To subject this claim for wages to a set-off of the kind here offered was to subject exempted wages to a species of legal seizure not admissible.

Let judgment be rendered here for the amount of the judgment below, and the amount of the judgment improperly allowed to be set off, and costs of appeal.

EXEMPTIONS — WAGES. — Money recovered as wages is exempt from garnishment: *Cox v. Bearden*, 84 Ga. 304; 20 Am. St. Rep. 359; *Wallace v. Lawyer*, 54 Ind. 501; 23 Am. Rep. 661, and note. Compare extended note to *Brown v. Hebard*, 91 Am. Dec. 411-425.

EXEMPTIONS — CONSTRUCTION OF STATUTE. — Statutes exempting property from execution should be liberally construed: *In re McManus*, 87 Cal. 250; 22 Am. St. Rep. 250, and note.

SET-OFF. — As to what demands may and what may not be pleaded by way of set-off or counterclaim, see note to *Gregg v. James*, 12 Am. Dec. 152-157; note to *Woodruff v. Garner*, 89 Am. Dec. 482-492.

EXUM v. STATE.

[90 TENNESSEE, 501.]

JURISDICTION — STATE COURTS HAVE, OVER OFFENSE COMMITTED IN FEDERAL CUSTOM-HOUSE, WHEN. — The state courts have jurisdiction of the crime of perjury committed upon the trial of a cause in a state court holding its session in a United States custom-house situated within the limits of a county town, by express permission of the federal authorities, and under a state law authorizing the judge to hold its sessions at any place within the limits of the county town, if he should deem it impracticable or inconvenient to hold them at the court-house.

THE opinion states the case.

J. M. Troutt, for Exum.

Attorney-General Pickle and E. L. Bullock, for the state.

TURNER, C. J. "If for any cause, in the opinion of the court, deemed sufficient it shall be impracticable or inconvenient for any court to hold its sessions at the court-house, or place designated by law, it shall be lawful for the court to hold its session, or any part thereof, at any room within the limits of the county town; and all its proceedings at such place, whether in civil or criminal cases, shall be as valid as if done at the court-house": Milliken and Ventrees's Code, sec. 4870.

At the time of the commission of the perjury charged, and of the finding of the indictment, the court-house was undergoing repairs. The court deemed it impracticable and inconvenient to hold its sessions therein, and by the consent and permission of the authorized agents of the United States government, the circuit court held its session in a room of the custom-house, — a building within the limits of the city of Jackson, the county town of Madison County, and within a few yards of the court-house.

On a trial before that court of a case cognizable only in the state courts for the county of Madison, the plaintiff in error was guilty of the crime of perjury, and was indicted by the grand jury for the county then holding its session as a part

of said court in the same building. On conviction, the prisoner moved an arrest of judgment, on the ground that, by the cession act of the legislature of 1883, the federal government has exclusive jurisdiction over the grounds, buildings, etc., and that such jurisdiction embraces all crimes committed on the premises.

As a general proposition, that is certainly true, but if by the law of the state a court is authorized to occupy a room other than the court-house, and the federal government, as it may certainly do, loans to the state court a room or rooms in its building, it, for the time of such loaning, makes a partial surrender of its right of occupancy, and recognizes the right of the state to be there in a judicial capacity for the dispatch of the public business. Will the courtesy of one government to another absorb the jurisdiction of the latter?

The jurisdiction of federal courts over crimes and misdemeanors is purely statutory. The laws of the state create and punish offenses which are not provided for in federal legislation. Must such offenses escape correction simply because committed on federal property, although detrimental to good order and morality?

The crime of perjury in this instance was, if an offense at all, one solely against the state. There is in it nothing of which a federal court can take cognizance. If the state courts cannot treat and punish it as a crime, it goes for nothing. If it goes for nothing, it must follow that it was not committed in a court.

We must reach to the extent of holding that the organization of the court in the rooms it occupied by the courtesy of the general government was a nullity, and as a consequence, all its proceedings in all matters, civil and criminal, are absolutely void, and any officer who executes, or attempts to execute, process awarded by judgments or decrees of that court is a trespasser.

If a state court may not, by the concurrent consent of state and federal authority, occupy as a court rooms in the custom-house, then in its attempt to do so it was a wrong-doer as to all litigants whose rights it assumed to pass upon.

It was without the pale of all protection by the laws of the state, and a helpless subject of every contempt possible to be offered it.

If it is holden that the state court lost its jurisdiction in going there in a criminal proceeding, it must result in hold-

ing, also, that the state and federal governments cannot only not contract with each other, but further, that they may not extend courtesies one to the other.

The law, as we see, authorizes the court to occupy rooms away from the court-house. There is no restriction in the permission.

The court is left to select the rooms and make its terms. It may arrange with any person; then why not with the United States government, the owner of the fee, with the absolute right of disposal?

The broad jurisdiction over and within the public grounds and buildings ceded to the United States is for its own protection, and so long as the power to protect is preserved, there is no violation of the cession act.

The terms in which the purposes of the act and the intentions of the United States government are expressed convey the single suggestion of security against trespass and its varying results, and were not intended to isolate the state from the federal government, or *vice versa*.

There must be lawlessness attending the act of presence on the premises before jurisdiction for security is invoked for the action of the federal courts. In the kindness extended by the one and accepted by the other government in this instance, there is neither moral nor legal wrong, — no rights endangered. The jurisdiction of the United States has in no wise been interrupted.

In coming to this conclusion, we have not been unmindful of the decisions of the supreme court (*Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, and other federal court decisions) on the question of jurisdiction. We do not dissent from the principles they announce, but we think they are not applicable to the peculiar facts of this case. In none of them has consent been given to occupancy by the state; in none of them has the crime committed grown out of proceedings before a tribunal authorized to act therein, and recognized by both state and federal governments as a constitutional department; there was no comity to be recognized between sovereigns.

Judgment affirmed.

FROM THIS OPINION JUSTICES LURTON AND SNODGRASS DISSENTED, the former writing an opinion expressive of such dissent. In it he claimed that as the act of the legislature of Tennessee had in express terms ceded to the United States the exclusive jurisdiction over the lot of ground on which the custom-house at Jackson stood, that there was thereby vested in the

United States exclusive jurisdiction over every crime committed within the boundaries of such lot; that as the crime of which the plaintiff in error was accused was committed, if at all, in a building upon the lot used by the state court for the purpose of holding its sessions therein, such crime, though committed against the state, was consummated within the limits of the lot which had been ceded to the United States, and over which it was not possible for the state of Tennessee to have acquired jurisdiction by the "mere courteous act of the custodian of the federal building or that of the federal government" in permitting a state court to use such building; that while any judgment of the state court rendered therein might be upheld as a judgment of a court *de facto*, yet that the crime of committing perjury in the state court, when held upon such lot, "was beyond the state's jurisdiction, and no agreement or consent can defeat the jurisdiction conferred by the constitution of the federal court, or vest in a state court jurisdiction over territory purchased by the United States with the consent of the legislature of the state; that it was an offense against the justice of the state, and not a case provided for by Congress, can operate to defeat federal jurisdiction; yet if this be the case, it would not follow that a state had jurisdiction to punish the accused because the federal criminal law may not provide for such crime."

PERJURY — JURISDICTION OF STATE COURTS. — A state court has no jurisdiction of the offense of perjury, committed before a commissioner of the United States during the investigation of a charge of violating the laws of the United States: *Ross v. State*, 55 Ga. 192; 21 Am. Rep. 278; or committed by swearing falsely before the register of the United States land-office, in a proceeding touching the public land: *People v. Kelly*, 38 Cal. 145; 99 Am. Dec. 360; or committed by one testifying before a notary public in the matter of a contested election of a member of the House of Representatives of the United States: *In re Loney*, 134 U. S. 372. The rule seems to be, that state courts have no jurisdiction to punish for perjury when made such under an act of Congress, unless, perhaps, in such instances in which the offense strikes at the integrity of the state in which the perjury is committed: Note to *State v. Shupe*, 85 Am. Dec. 492.

BALLARD v. SCRUGGS.

[90 TENNESSEE, 585.]

EXECUTION SALE OF UNDIVIDED INTERESTS IN LAND VOID WHEN. — A sale under execution of two undivided interests in a tract of land, under a joint judgment against the owners thereof, where such interests are sold together, is void.

EQUITY HAS JURISDICTION TO VACATE SATISFACTION OF JUDGMENT AND ENFORCE LIEN OF LEVY WHEN. — A court of chancery has jurisdiction to vacate a satisfaction of judgment effected through a void execution sale of lands, and if the levy is valid, to enforce its lien by a sale of the lands.

STATUTE OF LIMITATIONS OF TEN YEARS BARS ACTION ON JUDGMENT. — A suit to vacate the satisfaction of a judgment is to be treated as an action on a judgment, so far as any relief is sought by reason of such judgment, and is barred if not commenced within ten years from the date of the original judgment.

STATUTE OF LIMITATIONS OF TEN YEARS BARS SUIT TO ENFORCE LIEN OF LEVY. — A suit to enforce the lien of a levy of execution upon lands is barred by the lapse of ten years from the making of the levy.

EJECTMENT bill. The opinion states the case.

R. M. McKee, for Ballard.

M. B. McMahan, W. P. Turner, and G. W. Pickle, for Scruggs.

LURTON, J. This is an ejectment bill to recover possession of two undivided one-ninth interests in a tract of six hundred acres of land.

Complainants claim to have acquired the title of the defendants by virtue of judgments, levy, and sale, and exhibit a sheriff's deed for the interests they seek to recover.

Many objections have been urged to the proceedings under which complainants claim, only one of which need be determined.

T. and E. B. Scruggs owned each a one-ninth interest in the lands in controversy. Judgments were rendered against them, and executions levied upon the interest of each as tenants in common. These two undivided interests were sold together, and purchased by the judgment creditors, under whom complainants hold. This sale was void. Each interest should have been sold separately; otherwise one could not redeem his own interest without redeeming that of the other. It makes no difference that each was bound for the whole debt bid on the two interests. One might have been able to have redeemed his interest by paying off that part of the joint debt placed on his share. The other might have been willing to have let his interest go in discharge of the rest of the debt. Another result was to cut off the creditors of each from redeeming if such creditor was a separate creditor,

The case falls within the principle, frequently decided, that where an execution is levied upon two or more parcels of land belonging to the same debtor, that each parcel must be separately sold, in order that the debtor or his creditors may redeem one without being obliged to redeem all: *Cooke v. Walters*, 2 Lea, 116.

Before final decree, complainants amended their bill so as to pray that, in the event the execution sale should be held void, satisfaction of the judgments against the defendants might be set aside, and the lien of their levies enforced by decree.

Equity has jurisdiction to set aside satisfaction of a judg-

ment at law where the sale under execution was void: *Henry v. Keys*, 5 Sneed, 487; *Smith v. Hinson*, 4 Heisk. 250.

In the last case, under a bill to clear title claimed under sheriff's deed, it was held that complainants had obtained no title, because the debtor's interest was not a legal title, but that, under an amended bill, the chancery court could set aside satisfaction, and decree a sale of the property involved for the satisfaction of complainants' judgment.

In *Shannon v. Erwin*, 11 Heisk. 636, the case was this: The complainants filed a bill to clear title to property claimed under sheriff's deed. The court held that complainants' title was void for want of notice of sale to judgment debtor. It appearing, however, in the pleadings that complainant had made a valid levy, satisfaction was set aside, and the lien of the levy enforced by decree under prayer for general relief. See also *Christian v. Clark*, 10 Lea, 636.

To this relief defendants interpose the statute of limitations of ten years. The judgments and levies upon which complainants' title depended were more than ten years old when this bill was filed. By section 3473, Milliken and Ventrees's Code, "actions on judgments and decrees of courts of record of this or any other state or government" are barred in ten years. If this be treated as an action on a judgment, — as it undoubtedly is, so far as any relief is sought by reason of such judgment, — then it cannot be maintained: *McGrew v. Reasons*, 3 Lea, 485; *Cannon v. Lamon*, 7 Lea, 513. Aside from this, it is a suit to enforce the lien of a levy made more than ten years before such relief was sought. It falls within that clause of section 3473 providing that the bar of that section shall extend to "all other cases not expressly provided for": *Alvis v. Oglesby*, 87 Tenn. 180, 181; *Hughes v. Brown*, 88 Tenn. 578.

Affirm the decree dismissing bill.

EXECUTION SALE OF UNDIVIDED INTERESTS IN REALTY, WHEN NOT VOID. — Where each of two judgment debtors owned undivided fifths, which were sold together at one bid, and there was no allegation of fraud, the sale was not therefore absolutely void: *Jones v. Lewis*, 8 Ired. 70; 47 Am. Dec. 338.

VACATION OF SATISFACTION OF JUDGMENT. — As to when and under what circumstances a court of equity may vacate the satisfaction of a judgment, see *Magwire v. Marks*, 28 Mo. 193; 75 Am. Dec. 121; note to *Jones v. Burr*, 53 Am. Dec. 701-705. The vacation of the satisfaction of a judgment for fraud should not be allowed where the party seeking to have it vacated has been guilty of laches, or where the rights of the plaintiff would be prejudiced thereby: *Lee v. Vacuum Oil Co.*, 126 N. Y. 579.

JONES AND ABBOTT v. INSURANCE COMPANY.

[90 TENNESSEE, 604.]

FIRE INSURANCE — PREMIUM MUST BE PAID BACK IF RISK NEVER ATTACHED. — Where no risk has ever attached under a policy of fire insurance, the insurer must return the premium paid, provided the assured has been guilty of no fraud.

THE opinion states the case.

Webb and McClung, for the complainants.

Washburn and Templeton, for the respondent.

LURTON, J. The fire policy issued by the defendant company on lumber owned by the complainants contained in its written part a warranty that a continuous clear space of 150 feet should be maintained between the lumber insured and the saw-mill, dry-kiln, or any wood-working or manufacturing establishment, and that said space should not be used for the handling or piling of lumber thereon. This warranty was untrue when made, and untrue when the insured property was burned, by fire communicated from a saw-mill within the space provided for. The contract of insurance is a conditional one. If no risk attaches, no premium, in the absence of fraud, is earned. Where the risk never attached, and no risk was ever run, the premium is to be returned, in case it has been paid, and the assured was guilty of no fraud: May on Insurance, sec. 4.

The language of Lord Mansfield, in *Tyree v. Fletcher*, Cowp. 668, was, that "where the risk had not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned."

The facts of this case show no intentional fraud on part of assured, and his premium, never having been earned, must be returned.

Other points in the case were disposed of orally.

FIRE INSURANCE — RESCISSION OF CONTRACT — REPAYMENT OF PREMIUM. — Where any of the material representations in a fire insurance policy are false, the insurer can cancel the same by a tender of the premium and notice of cancellation: *Rankin v. Amazon Ins. Co.*, 89 Cal. 203; 23 Am. St. Rep. 460. Unless the premium is returned, the policy will remain in effect: *Scott v. Sun Fire Office*, 133 Pa. St. 322; *Quong Tue Sing v. Anglo-Nevada Ass. Corp.*, 86 Cal. 566; *Pangborn v. Continental Ins. Co.*, 67 Mich. 683.

GAY v. STATE.

[90 TENNESSEE, 645.]

NUISANCE—PARTY LIABLE ONLY FOR SUCH, AS RESULTS FROM HIS OWN ACT.—A nuisance, to be indictable, must be the natural and direct cause of the act of the party charged with maintaining it. It is therefore error, upon the trial of an indictment for maintaining a nuisance in keeping a hog-pen in a filthy condition, for the court to charge that “if the jury find that the smell created by the defendant’s pen was not sufficient within itself to constitute a nuisance, yet it contributed, with other pens in the neighborhood, to forming a nuisance, the defendant would be guilty.”

THE opinion states the case.

W. C. Cain, for Gay.

Attorney-General Pickle, for the state.

LEA, J. The plaintiff in error was indicted and convicted of a nuisance in keeping and maintaining a hog-pen in a filthy condition. There were several witnesses who proved it was a nuisance. There were several who proved that the pen was kept remarkably clean, and was no nuisance; and several proved that if there was a nuisance, it was caused by a number of hog-pens in the neighborhood.

His honor, among other things, charged the jury: “If the jury find that the smell created by the defendant’s pen was not sufficient within itself to constitute a nuisance, yet it contributed, with other pens in the neighborhood, to forming a nuisance, the defendant would be guilty.”

This was error. The defendant can only be held liable for the consequences which his act produced. The nuisance complained of must be the natural and direct cause of his own act.

NUISANCE BY SEVERAL—LIABILITY OF EACH.—Where a nuisance is maintained by several persons acting independently, each is liable only for the separate injury committed by him: *Chipman v. Palmer*, 77 N. Y. 51; 33 Am. Rep. 566, and note; *Simpson v. Seavey*, 8 Greenl. 138; 22 Am. Dec. 228, and note. So a landlord is not liable for a nuisance maintained by a tenant: *Commonwealth v. Wentworth*, 146 Mass. 36. Compare *Simmons v. Everson*, 124 N. Y. 319; 21 Am. St. Rep. 676, and note.

ROBINSON v. COULTER.

[90 TENNESSEE, 705.]

INFANT'S DEED WITHOUT CONSIDERATION VOID. — An infant's deed of land, made without consideration, or for a merely nominal consideration, is absolutely void, and vests no title in the grantee.

COVENANT OF SEISIN IN DEED, WHEN BROKEN. — A covenant of seisin in a deed of land is broken as soon as made, where the vendor, at the time of the conveyance, had no other title to the land than that acquired by him through the deed of an infant, made for a merely nominal consideration.

COVENANT OF SEISIN, GRANTEE MAY TREAT, AS WHOLLY BROKEN WHEN. — Where a deed with covenant of seisin purports to convey the entire estate, and the title fails as to an undivided interest therein, the grantee may elect to treat this as an entire failure of title, and is entitled to recover the full value of the property.

SUIT for breach of covenant. The opinion states the case.

Lewis Shepherd, and Spurlock and Latimore, for Robinson.

Barr and McAdoo, for Coulter.

SNODGRASS, J. Complainant sold to defendant a tract of land containing 640 acres at the price of ten thousand dollars, taking in payment therefor property at an agreed valuation. Among the property so taken was a lot in the city of Chattanooga, on Magazine Street, valued at four thousand dollars. The defendant executed to complainant a warranty deed for this lot, covenanting that he was seised in fee thereof, and had a good right to convey it. The deed was executed February 23, 1888.

This suit is to recover damages to the amount of the value of the lot on account of breach of covenant of seisin. The chancellor decreed in favor of complainant, and defendant appealed.

The only error assigned material to be noticed is that respecting this covenant. It is insisted that it was not broken. The facts on this point are these: Coulter's title was derived through one Cady, who had purchased the lot of Mrs. Julia Bradt in 1882. At the time of this purchase by Cady and conveyance by Mrs. Bradt, the legal title was in her children, by descent from Morris Bradt, her deceased husband. There were six of these children, all minors. On December 16, 1887, these children joined their mother in another deed to Cady. In this, they recited the former deed of Mrs. Bradt; that it was a warranty deed, and that her vendee had conveyed, and that they are desirous of protecting their

mother; and add that, in consideration of the premises, and the sum of one dollar paid, they quitclaim the property to Cady.

Five of the children joining in this deed were minors. One of these has since, on coming of age, conveyed to Coulter. The other four have made no other conveyance, and unless the deed of December 16, 1887, conveyed their interest, they still own four sixths of the lot in controversy. The material question, therefore, is the legal effect of this deed. If it is a voidable deed merely, as insisted by defendant,—one which no one has a right to avoid but the minors after arrival at age,—it vested their interest in their vendee, Cady, and that interest subsequently passed to the defendant. In this event, the covenant of seisin was not broken when made, because a voidable deed is one which passes the title of the vendor, and while it remains in force, is a valid conveyance, and vests in the vendee a title in fee the character of estate of which he covenants that he is seised: *Pollard v. Dwight*, 4 Cranch, 431; *White v. Flora*, 2 Over. 431.

If the deed was void, it passed no title, and therefore, as to two thirds of the land, the defendant was never seised in fee, and the covenant was breached as soon as made.

The question in this state is settled. The rule governing the contracts of minors, long established, is, that they are either void, voidable, or valid, according as they shall appear prejudicial, uncertain, or beneficial. If to his benefit,—as for necessities,—they are valid; if of an uncertain character as to benefit or prejudice, they are voidable only, at his election after coming of age: *Wheaton v. East*, 5 Yerg. 41; 26 Am. Dec. 251; *McMinn v. Richmonds*, 6 Yerg. 9; *McGan v. Marshall*, 7 Humph. 121; *Langford v. Frey*, 8 Humph. 446; *Scott v. Buchanan*, 11 Humph. 468.

The cases above referred to in 5 Yerger, 7 Humphreys, and 11 Humphreys were cases of conveyance of land, absolutely and in mortgage, for a valuable consideration, and these and all such deeds held to be voidable only, at the minor's election after arrival at age.

To the same effect is *Barker v. Wilson*, 4 Heisk. 268.

In *Scott v. Buchanan*, 11 Humph. 473, it was shown that this was the rule as to the minor's conveyance of land; but that a different rule prevailed as to his voidable conveyance of personalty, which he might avoid during infancy. And in the case of *McGan v. Marshall*, 7 Humph. 125, 126, it was

said that the court cannot look outside the face of the deed to determine whether the deed was void or voidable, but the question must be settled as it there appeared.

These were instances where a valuable consideration appeared to have passed, and the deeds were held voidable only.

The question came collaterally in issue in *Langford v. Frey*, 8 Humph. 446. There a witness had released his interest in an estate in order to remove objection to his competency. In the testimony it was disclosed that he was a minor, and the court held the release absolutely void, and the witness was held to be incompetent.

Finally the direct question arose on a void deed, and the court held that a deed where minors, without consideration, quitclaimed their interest in the land of a deceased sister to her surviving husband — who had paid for the land and given it to her — was absolutely void; and they were permitted to release it during infancy, — a right which would have been denied them had the deed been merely voidable: *Swafford v. Ferguson*, 3 Lea, 292; 31 Am. Rep. 639. This case was cited and approved, and the rule again asserted, in *Scobey v. Waters*, 10 Lea, 557. It is therefore settled by a long line of decisions in this state that such a deed as that we are considering — a minor's release and quitclaim without consideration — is absolutely void.

It follows, of course, their deed being void, their title to four sixths of this land had not been conveyed to Cady, and never passed to defendant in subsequent conveyance.

The complainant had the right to elect to treat this as an entire failure of title, and is entitled to recover the full value of the lot, the effect of such decree revesting title in the defendant, who will also be entitled to restoration of possession and reconveyance: *Kincaid v. Brittain*, 5 Sneed, 121-125.

The decree is affirmed, with cost.

INFANTS — DEED OF, WITHOUT CONSIDERATION, VOID. — An infant's deed without consideration is void, and not simply voidable: *Swafford v. Ferguson*, 3 Lea, 292; 31 Am. Rep. 639, and note. An infant cannot be bound by a transfer of his property which is not for his benefit: *Bloomingdale v. Chittenden*, 74 Mich. 698. The plaintiff who seeks to set aside a deed made during infancy must establish his infancy and that no consideration passed: *Wade v. Love*, 69 Tex. 522.

COVENANT OF SEISIN IN A DEED — WHEN BROKEN. — A covenant of seisin in a deed is broken if the grantor did not have a good title to the

property conveyed: *Trice v. Kayton*, 84 Va. 217; 10 Am. St. Rep. 836, and note; *Baker v. Hunt*, 40 Ill. 264; 89 Am. Dec. 346, and note; *Backus v. McCoy*, 3 Ohio, 211; 17 Am. Dec. 585, and note; *Moore v. Johnson*, 87 Ala. 220; *Mygatt v. Coe*, 124 N. Y. 212. The covenant of seisin for failure of title is broken at the time of the conveyance: *Clement v. Bank*, 61 Vt. 298. See extended note to *Morse v. Garner*, 47 Am. Dec. 570.

CASES
IN THE
COURT OF APPEALS
OF
TEXAS.

COOPER v. STATE.

[29 TEXAS APPEALS, 8.]

EVIDENCE — JUDGMENT. — ON THE TRIAL OF AN INDICTMENT FOR RECEIVING PROPERTY knowing it to have been stolen, a judgment convicting and sentencing another person for stealing the same property, together with the indictment on which it was found, is admissible in evidence against the accused for the purpose of showing that such property had been stolen by such other person.

EVIDENCE. — THE DECLARATION OF ONE WHO HAS BEEN CONVICTED of stealing property, that another person indicted for receiving it, knowing it to have been stolen, had no connection with the theft, and had bought the property in good faith and for value, is not admissible in favor of the latter.

EVIDENCE — POSSESSION OF STOLEN PROPERTY AS EVIDENCE OF GUILT. — It is error to instruct a jury that the possession of stolen property is a circumstance sufficient to warrant the presumption of guilt on the part of the person having such possession, if the evidence shows that such possession was recent, personal, exclusive, and unexplained. The instruction upon this subject should be, that such possession is a mere circumstance to be considered by the jury in connection with other evidence in the case in determining the issue of the defendant's guilt.

INDICTMENT for theft, the second count of which charged the defendant with receiving stolen property knowing it to be stolen. After the prosecution had put in its evidence in chief, and the defendant his testimony in response, the state offered in evidence an indictment against defendant and three others for the theft of the same property, and a judgment convicting one of the others thereon. The court, against the objection of the defendant, permitted the indictment and conviction to be read in evidence. Defendant then offered to prove that

the person so convicted, when the indictment was first served upon him, openly declared that the defendant had nothing to do with the theft, but bought the property, after the theft, in good faith and for value. The evidence of such declaration was excluded. The defendant, having been convicted, appealed.

McCall and Britt Brothers, Charles Wheeler, Jo Hall, and N. P. Jackson, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WILLSON, J. There are two counts in the indictment, the first charging the theft of a horse, and the second the receiving said horse, knowing the same to have been stolen. In support of the second count, to show that said horse had been stolen by another person than the defendant, and before defendant was found in possession of said horse, the state was permitted, over the defendant's objections, to introduce and read in evidence an indictment charging one Hill with the theft of said horse, and a judgment of conviction and sentence of said Hill for said theft. For the purpose for which this testimony was admitted we think it was relevant and otherwise admissible: Wharton's Crim. Ev., sec. 602. It afforded *prima facie* proof that the horse had been stolen by Hill at the time the defendant came into possession of it. That said testimony was admitted after defendant had closed his testimony, and was not in rebuttal of any testimony adduced by him, is not a valid objection on appeal, it not appearing that the trial court abused its discretion to the injury of the defendant in admitting said testimony. This testimony was, by the charge of the court, expressly limited to the purpose for which it was admitted, and the jury were told to consider it for no other purpose.

As to the testimony offered by the defendant and rejected, it was clearly inadmissible. It was in part hearsay, and in part irrelevant and immaterial.

There is ample evidence, we think, to warrant the instructions as to the law of principals in crime. That defendant and others acted together in the theft of the horse to such extent as to make them all principals in the theft is clearly shown by the testimony of the accomplice witness Shannon. Whether or not the testimony of the accomplice was sufficiently corroborated to warrant a conviction was a question for the jury to determine, and the trial court properly and correctly submitted that question to the jury; and in doing so it was not only right, but was the duty of the court, to in-

struct the jury in relation to the law as to principals. It is contended, however, by counsel for defendant that there is no evidence which corroborates the accomplice testimony, to the extent required by the law, and that the uncorroborated testimony of an accomplice cannot form the basis of an instruction from the court. We differ with counsel in his view of the evidence and of the law. We think there is evidence corroborating the accomplice testimony. That defendant was found in possession of the horse shortly after the same was stolen, is certainly a corroborating circumstance tending to connect the defendant with the theft. That he placed the saddle where Shannon could get it is another such circumstance. That he was in the town on the night the horse was stolen, but could not be found there on the next morning, and when seen a few days thereafter was five hundred miles distant from the place of the theft, are circumstances tending to connect him with the theft of the horse, and which in material matters corroborate said accomplice testimony.

We find the charge of the court free from error except in one particular. As to the circumstance of defendant's possession of the horse recently after the same was stolen, the charge is as follows: "The possession of property stolen is not positive evidence of guilt, but is a circumstance sufficient to warrant the presumption of guilt on the part of the person having such possession, if the evidence shows such possession was recent, was personal and exclusive, and unexplained," etc. This paragraph of the charge was excepted to by the defendant at the trial, and a bill of exception thereto was duly reserved. In *Lee v. State*, 27 Tex. App. 476, this court held a similar instruction erroneous, as being upon the weight of evidence. In the above-quoted paragraph the jury was told that the personal, exclusive, unexplained, and recent possession of the horse, after the same was stolen, was sufficient evidence to warrant the conviction of the defendant of the theft of said horse. The instruction should have been that such possession was a mere circumstance to be considered by the jury in connection with other evidence in the case in determining the issue of defendant's guilt.

Because of the above-stated erroneous instruction, the judgment is reversed, and the cause is remanded.

CRIMINAL LAW — EVIDENCE — RECORDS OF FORMER TRIAL AS EVIDENCE — Record of the conviction and sentence of a party is proper evidence on the trial of a prisoner for assisting that party to escape from prison: *Murray*

v. *State*, 25 Fla. 523. And the records of the court are competent evidence to establish a former conviction of a felony: *People v. Smith*, 121 N. Y. 578.

CRIMINAL LAW — ACCOMPLICES AS WITNESSES. — The evidence of an accomplice must be treated by the jury with great suspicion: *Cheatham v. State*, 67 Miss. 335; 19 Am. St. Rep. 310, and note. See *Mixon v. State*, 28 Tex. App. 347. See note to *Garcia v. State*, 82 Am. Dec. 607. One cannot be convicted on the uncorroborated testimony of an accomplice: *People v. Kraker*, 72 Cal. 459.

CRIMINAL LAW — EVIDENCE — POSSESSION OF GOODS. — Possession of recently stolen property, to warrant an inference of guilt, must be personal, exclusive, and unexplained: *Jackson v. State*, 28 Tex. App. 370; 19 Am. St. Rep. 839, and note; *Matlock v. State*, 25 Tex. App. 454; 8 Am. St. Rep. 451, and note; *Jackson v. State*, 28 Tex. App. 143; *State v. Warford*, 106 Mo. 55. See *State v. Jennings*, 79 Iowa, 513.

JONES v. STATE.

[29 TEXAS APPEALS, 20.]

EVIDENCE — CONFESSIONS — INSTRUCTIONS. — Where the evidence against one on trial for murder consists mainly of admissions made by him soon after the homicide, and the confessions contain exculpatory or mitigating circumstances which are not shown by other evidence to be false, the jury should be instructed that the whole of the admissions or statements are to be taken together, that the state is bound by them, unless they are shown by the evidence to be untrue, and that they are to be taken into consideration by the jury in connection with all the other facts and circumstances in the case, and if not so instructed, the judgment should be reversed.

A. W. O. Hicks, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WILLSON, J. This conviction is for murder in the second degree, and is based mainly upon the admissions made by the defendant soon after the homicide. He stated, in substance, that he killed the deceased, but that he killed him in self-defense. There was no evidence adduced by the state directly contradicting the statement of defendant that he killed the deceased in self-defense. Some slight circumstances were proved by the state tending to show that the homicide was actuated by malice, and negating the theory of self-defense, but it cannot be said that defendant's claim of self-defense was disproved by the state.

On the trial, counsel for defendant requested a special instruction, as follows: "When the admissions or confessions of a party are introduced in evidence by the state, then the whole of the admissions or confessions are to be taken to-

gether, and the state is bound by them, unless they are shown by the evidence to be untrue. Such admissions or confessions are to be taken into consideration by the jury as evidence, in connection with all the other facts and circumstances of the case."

This instruction was refused, and the defendant reserved a bill of exception. We think that under the facts of this case the instruction was pertinent, correct in principle, and should have been given. We do not wish to be understood as holding that in all cases where the admissions or confessions of a defendant are admitted in evidence against him, that it is necessary to give such or a similar instruction to the jury. What we decide is, that in this case, in which the criminating evidence consists almost entirely of defendant's admission that he killed the deceased, the instruction should have been given, in view of the fact that the exculpatory portion of defendant's statements about the homicide were not shown by the state's evidence to be untrue. We are of the opinion, however, that in all cases where admissions and confessions of a defendant are admitted in evidence against him, and such admissions or confessions contain exculpatory or mitigating statements, it would be proper and just to the defendant to instruct the jury as was requested in this case: *Pharr v. State*, 7 Tex. App. 472; 1 Greenl. Ev., 9th ed., secs. 218, 219, 442, 443; 1 Bishop's Crim. Proc., secs. 1235, 1236.

Because of the refusal of the court to give said requested instruction, the judgment is reversed, and the cause is remanded.

CRIMINAL LAW — CONFESSIONS AS EVIDENCE. — The general rule is, that all a party has stated in his confession which is relevant to the questions involved in the trial is admissible in evidence, where the confession had been properly obtained: *Hendrickson v. People*, 10 N. Y. 13; 61 Am. Dec. 721, and note; *Carroll v. State*, 23 Ala. 28; 58 Am. Dec. 282; *State v. Hamilton*, 42 La. Ann. 1204. See *Crowder v. State*, 28 Tex. App. 51; 19 Am. St. Rep. 811, and note.

HARRIS v. STATE.

[29 TEXAS APPEALS, 101.]

LARCENY — TAKING OF PROPERTY, WHAT SUFFICIENT TO CONSTITUTE. —

Under the code of Texas, the essential element of theft is a fraudulent taking of property, and such taking is sufficiently established by evidence showing that the property, consisting of money, was in a drawer which the accused had unlocked with his own keys and had opened; that his hands were in the drawer when he was discovered; that in response to a command to hand over the money he had taken, he had surrendered some which was in his hands and some out of his pocket, which, together with that remaining in the drawer, made up the full amount which was therein before he unlocked it.

LARCENY. — HANDING IMMEDIATELY BACK TO THE OWNER PROPERTY feloniously taken does not purge the offense.

Gustave Cook, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. This appeal is from a judgment of conviction for theft of over twenty dollars in money.

The case is a novel one, and the facts, succinctly stated, are fully set forth in the following statement of the prosecuting witness, viz.: "The defendant was employed by me to do some work in the back part of my store. His work did not require him to go upstairs. I noticed him go upstairs, and almost immediately he came down and went off the premises. Very soon, on the same day, he came back, and I observed him again going upstairs, where he had no business. I then followed him upstairs, and saw him have his hand in a [bureau] drawer which I had left locked, and in which I had locked up fifty-one dollars in money, of the silver coinage of the United States, of the value of fifty-one dollars, and which was my property. Defendant had unlocked my drawer with his own keys, which were then in the drawer, and had his hand in the drawer when I saw him. The drawer which I had left locked, and in which I had the money, was unlocked and pulled out about one foot, and his hand was in this drawer, and his keys were in the keyhole of the drawer, when I discovered him. I at once demanded of him to hand over the money which he had taken, or I would call a policeman at once. He gave me what he had in his hand and some that he had in his pocket. The money that he gave me was six dollars in silver. The other forty-five dollars was in the drawer, and what he returned to me and what was still in the drawer when I came up made up the fifty-one dollars I [had] left in the drawer [before the theft]."

Upon this state of the case the prosecution insisted that defendant was liable for the theft of the fifty-one dollars and guilty of a felony, whilst the defense was, that he was only liable for the theft of six dollars, which would be a misdemeanor.

In the general charge, the court instructed the jury, in effect, that if defendant, under circumstances amounting to theft, unlocked the drawer and partly removed the open drawer and took therefrom a part of the money contained in said drawer, though the part so taken may have been less than twenty dollars at the time he was discovered in the act of removing the contents of the said drawer, then they should find him guilty of theft of twenty dollars or over, and assess his punishment in the penitentiary not less than two nor more than ten years. At the instance of defendant, a special requested instruction, presenting the defendant's theory, was given, to the effect that if the jury were not satisfied beyond a reasonable doubt that the defendant took at least twenty dollars into his actual possession, then they should find him guilty of theft of property of value less than twenty dollars, and fine him not to exceed five hundred dollars and imprison him in the county jail not to exceed one year, or imprison him without fine.

As above stated, defendant was found guilty of a felony, — that is, of theft of twenty dollars and over, — and given two years in the penitentiary. In other words, he has been found guilty of the theft of the entire amount of fifty-one dollars, the entire sum of money contained in the drawer.

At common law, the main contention in such a case would have been as to the sufficiency of the proof to establish asportation of the property, which, at common law, was an essential ingredient of larceny. "At common law," says Mr. Russell, "it appears to be well settled that the felony lies in the very first act of removing the property, and therefore that the least removing of the thing taken from the place where it was before with an intent to steal it is a sufficient asportation, though it be not quite carried away"; citing 4 Bla. Com. 231. Again he says: "But if any part of the thing is removed from the space that part occupied, though the whole thing is not removed from the whole space which the whole thing occupied, the asportation will be sufficient": 2 Russell on Crimes, 9th Am. ed., 152.

Mr. Bishop says: "The doctrine is, that any removal, how-

ever slight, of the entire article, which is not attached either to the soil or to any other thing not removed, is sufficient, while nothing short of this will do. Therefore, if the thief has the absolute control of the thing but for an instant, the larceny is complete": 2 Bishop's Crim. Law, 7th ed., secs. 794, 795.

We are not prepared to say that even at common law the facts in this case would not sufficiently have established the asportation of the entire sum of money contained in the drawer. This, however, it is unnecessary for us to decide, since under our statutes asportation is not necessary to constitute the crime of theft. With us the essential element of theft is the fraudulent taking: Pen. Code, art. 724; and it is expressly provided that "to constitute 'taking' it is not necessary that the property be removed any distance from the place of taking; it is sufficient that it has been in the possession of the thief, though it may not be moved out of the presence of the person deprived of it; nor is it necessary that any definite length of time shall elapse between the taking and the discovery thereof, — if but a moment elapse the offense is complete": Pen. Code, art. 726. Neither asportation nor actual manual possession of the property is, under our code, essential to constitute theft: *Conner v. State*, 24 Tex. App. 245; *Coward v. State*, 24 Tex. App. 590; *Doss v. State*, 21 Tex. App. 505; 57 Am. Rep. 618; Willson's Crim. Stats., sec. 1267.

The rule with us is, that, "to constitute theft, there must be a fraudulent taking of the property, and while there may be a taking of the property without actual manual possession of it, still the property must in some manner have come into the possession of the party accused of the theft, either actually or constructively, or he cannot be said to have taken it": *Minter v. State*, 26 Tex. App. 217. Where there has been no actual manual taking, still a constructive possession and a constructive interruption of the possession of the owner of the property, or where the accused has actual control of the property, — that is, has it under his actual dominion with power to take it into his actual manual possession, — it is sufficient: *Minter v. State*, 26 Tex. App. 217.

In the case in hand, the defendant had taken actual control and possession of all the money in the drawer when he unlocked and pulled out the drawer, and had dominion over it, with power to take it into his actual manual possession. The charge of the court presented the law correctly, and the evidence is sufficient to support the conviction.

There was no voluntary return of the property: *Grant v. State*, 2 Tex. App. 163; Willson's Crim. Stats., sec. 1287. "A person who takes a thing feloniously does not purge the offense by handing it immediately back to the owner": 2 Bishop's Crim. Law, 7th ed., sec. 796.

We have found no error in the conviction, and the judgment is affirmed.

LARCENY — WHAT TAKING SUFFICIENT TO CONSTITUTE. — Secrecy is the usual evidence of felonious intent in larceny, but if defendant knowingly took the goods of another, making no claim of right to them, with the intent to deprive the owner of them, he is guilty of larceny: *State v. Powell*, 103 N. C. 424; 14 Am. St. Rep. 821, and note. The fact that he abandoned the property taken will not alter the offense: *State v. Davis*, 38 N. J. L. 176; 20 Am. Rep. 367; *State v. Farrow*, Phil. (N. C.) 161; 93 Am. Dec. 585, and note.

LEWIS v. STATE.

[29 TEXAS APPEALS, 201.]

EVIDENCE — RES GESTÆ. — DECLARATIONS OF AN IGNORANT NEGRO WOMAN, made from half an hour to an hour after she was injured, showing when, how, and by whom the wound was inflicted, when she had not spoken to any one after her injury, are admissible as part of the *res gestæ*, after her death, on the trial of the person accused of killing her.

EVIDENCE — RES GESTÆ. — TO CONSTITUTE DECLARATIONS A PART OF THE RES GESTÆ, it is not necessary that they were precisely coincident with the principal fact. If they sprang out of the principal fact, tend to explain it, were voluntary and spontaneous, and made at a time so near it as to preclude the idea of deliberate design, they may be regarded as contemporaneous, and admitted in evidence.

EVIDENCE. — DECLARATIONS OF ONE WHO HAS KILLED ANOTHER, SHOWING A WISH TO KILL OTHERS because of their friendship with the decedent, are admissible in evidence for the purpose of proving malice.

DEFENDANT, a negro, was indicted and convicted of the murder of his mother-in-law. She had caused him to be arrested for misdemeanor, of which he was convicted, and he threatened to kill her therefor as soon as he should be released from jail. After his release, he went to see her, and assured persons who were at the same house that he did not wish to injure her. They then went away, leaving the accused talking with her, but in a few moments heard her scream, and saw that he was bending her backward against his left arm. He immediately released her and walked away, and thereupon she exclaimed that she had been cut all to

pieces. He claimed that the cutting was done accidentally, in a struggle for the possession of a razor.

J. D. McMahon, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WILLSON, J. This conviction is for murder in the first degree, and the death penalty is assessed. Deceased was the mother-in-law of the defendant, and was killed with a razor.

Over objection of the defendant, the state proved, by doctors Hudson and Talley, that within from a half hour to one hour and a half after deceased had been wounded, she stated to them that "Joe Lewis had come up behind her while she was at the wash-tub, ran his hand under her arm, pulled her backward, and cut her nearly in two." The trial judge explains the admission of this evidence as follows: "The testimony shows the deceased to have been an ignorant negro woman, and that between the infliction of the wound and her statement to the doctors she had not spoken, except in a scream or moan, caused presumably from pain; and I believe the circumstances surrounding this ignorant negro woman utterly preclude the idea of deliberate design, but on the contrary, was as voluntary and spontaneous as if uttered when she fell under the blow. The evidence was not offered or admitted as dying declarations, but as part of the *res gestæ*." We agree with the trial judge that the evidence was *res gestæ*, and admissible. In order to constitute declarations a part of the *res gestæ*, it is not necessary that they were precisely coincident in point of time with the principal fact. If they sprang out of the principal fact, tend to explain it, were voluntary and spontaneous, and made at a time so near it as to preclude the idea of deliberate design, they may be regarded as contemporaneous, and are admissible in evidence: *Foster v. State*, 8 Tex. App. 248; *Tooney v. State*, 8 Tex. App. 452; *McInturf v. State*, 20 Tex. App. 335; *Powers v. State*, 23 Tex. App. 42; *Irby v. State*, 25 Tex. App. 203. We think the declarations made by the deceased, and admitted in evidence, came within the above-stated rule, considering the circumstances under which they were made, which circumstances exclude the conclusion that they might have been made with deliberate design, or were fabricated by the deceased.

Anderson, a witness for the state, testified about a conversation he had with the defendant after the homicide, which

conversation took place in Laredo, Texas. He testified that the defendant told him, in said conversation, that he killed the deceased, and in detailing this conversation the witness further stated that defendant said that he wanted to kill Mr. Kelley and others at Belton who had interfered with him, etc. The statements made by the defendant as to other persons than the deceased were objected to by his counsel, upon the ground that they were irrelevant. The objection was overruled, and a bill of exception reserved, which, although not as full and specific as it should be, will be considered. We think the testimony objected to was relevant and admissible. It was relevant to the issue of express malice. It tended to show that the defendant's enmity towards the deceased was so intense that it embraced her friends. He was speaking about the homicide, and his statements with reference to the other persons whom he desired to kill showed that such desire arose from the friendship of those parties to the deceased, and that it was because of his malice toward her that he entertained malice toward them. This, we think, is a fair inference from the conversation as detailed by the witness Anderson. Statements made by a slayer before, at the time of, and even after the homicide are often pertinent evidence to show express malice: *Duebbe v. State*, 1 Tex. App. 159; *Garza v. State*, 11 Tex. App. 345; *McKinney v. State*, 8 Tex. App. 626. We are clearly of the opinion that the court did not err in admitting the testimony objected to. See also *Hart v. State*, 15 Tex. App. 202; 49 Am. Rep. 188.

As to the remarks of prosecuting counsel excepted to by the defendant, we see nothing improper in those made by the county attorney. Those made by Judge Kirk were not unexceptionable, but in view of the evidence in the case, could not, we think, have influenced the verdict. Upon the evidence in the case, the verdict could not reasonably have been other than guilty of murder in the first degree, and the murder was of a character so brutal, so fiendish and cruel, that the punishment of death, the highest prescribed by the law, is fully warranted.

There is no error for which the conviction should be disturbed, and the judgment is affirmed.

CRIMINAL LAW — DECLARATIONS OF INJURED PERSON — RES GESTÆ. — The statement of a wounded and bleeding woman as to the cause of her injury, terminating in her death, is admissible as a part of the *res gestæ*, when made immediately after the occurrence: *Commonwealth v. McPike*, 3

Cush. 181; 50 Am. Dec. 727, and note; *State v. Molisse*, 38 La. Ann. 381; 58 Am. Rep. 181, and extended note; *Drake v. State*, 29 Tex. App. 265; *Weathersby v. State*, 29 Tex. App. 278. *Contra*, see *Mayes v. State*, 64 Miss. 329; 60 Am. Rep. 58; *Binns v. State*, 57 Ind. 46; 26 Am. Rep. 48.

EVIDENCE — RES GESTÆ — WHAT CONSTITUTES. — *Res gestæ* are those circumstances which are the incidents of a particular act, and illustrative of it. They must stand in immediate causal relation to the act, but may be separated from the act by a more or less appreciable lapse of time: *Ward v. White*, 86 Va. 212; 19 Am. St. Rep. 883, and note; *State v. Mathews*, 98 Mo. 125.

CRIMINAL LAW — HOMICIDE — PROOF OF MALICE. — Evidence of any facts which go to afford an inference of the existence of malice are admissible: *State v. Deschamps*, 42 La. Ann. 567; 21 Am. St. Rep. 392, and note; *Walker v. State*, 85 Ala. 7; 7 Am. St. Rep. 17, and note. Covert or vague threats made by one in regard to a crime are competent evidence against one charged with its commission: *State v. Crawford*, 99 Mo. 74; *Muscoe v. Commonwealth*, 87 Va. 460.

SNELL v. STATE.

[29 TEXAS APPEALS, 236.]

EVIDENCE — DYING DECLARATIONS, WHAT ADMISSIBLE AS. — Declarations made by one after receiving an injury, reduced to writing, and sworn to by him at a time when he did not apprehend death, are admissible in evidence as dying declarations, if he, after becoming conscious of approaching death, and without hope of recovery, refers to and reaffirms such statements, though they are not then shown or read to him.

EVIDENCE CONTRADICTING DYING DECLARATIONS. — It is not error to refuse to permit a witness to state that the decedent had made statements different from his dying declarations, if the witness is unable to state the substance of the alleged contradictory statements.

HOMICIDE — DEFENSE OF ANOTHER. — ONE BROTHER is justified in interfering in the defense of another, when the latter is in an angry struggle with a third person, who attempts to possess himself of a club with the apparent purpose of using it on the brother. The brother thus interfering is justified not only in seeking the club, but, if necessary for the protection of his brother, in striking with it.

HOMICIDE — INTENT. — If one brother comes to the assistance of another, who is engaged in a fight, and whose adversary is seeking to obtain a club with which to strike the brother with whom he is fighting, the assisting brother is not chargeable with the murderous intent of the fighting brother, unless it be shown that he knew, or might reasonably have known, of such intent.

JURY TRIAL — CRIMINAL LAW. — The failure of the judge to instruct the jury upon the law of self-defense is an error calling for the reversal of a judgment of conviction, when there is evidence in the case fairly presenting the issue of self-defense.

INDICTMENT against Charles Snell for the murder of J. B. Whitefield, resulting in a conviction for manslaughter. There was evidence tending to show that while decedent and Samuel

Snell were engaged in a fight, the former ran to get a club; that the defendant, seeing this, ran for the club at the same time, and prevented decedent from getting it, and threw it away; but the decedent, in his dying declaration, claimed that the defendant tried to strike him with his club. There was no doubt that Samuel Snell, brother of the defendant, cut the decedent with a knife, inflicting wounds from which his death resulted, but the defendant claimed that he had nothing to do with this, and did not know that his brother had or intended to use a knife, and that defendant did not take any part in the fight, except to get and throw away a club which decedent tried to get for the purpose of striking defendant's brother. The next day after receiving his injury, the decedent made a statement which was reduced to writing, and sworn to by him. Six days afterwards, and when decedent had become satisfied he could not recover, he referred to his prior statement, saying that it was true, and that he had sworn to it, and would make no more statements.

D. G. Smith and W. B. Dunham, for the appellant.

W. L. Davidson, assistant attorney-general for the state.

WILLSON, J. We are of the opinion that the statements of the deceased, reduced to writing and signed and sworn to by him before the witness Fletcher, were properly admitted in evidence as dying declarations, it having been proved that the deceased was fully cognizant of said statements, and that afterwards, when he was conscious of approaching death, and was without hope of recovery, and was sane, he reaffirmed said statements. In Wharton's Criminal Evidence, 9th ed., sec. 287, it is said: "Prior declarations, though in themselves inadmissible, may become admissible, on subsequent affirmation, in cases where, although the declarant did not at the time of first making them believe he was about to die, he subsequently referred to them and affirmed their truth at a time when he knew he was dying." See also *Mockabee v. Commonwealth*, 78 Ky. 380. It was not necessary, we think, that said statements should have been shown to or read over to the deceased at the time he reaffirmed the same, as it was clearly proved that he knew and fully understood the same, and he referred to and adopted them at a time when he knew he was dying and just before his death, and when requested to make a dying declaration.

It was not error to refuse to permit the witness Thornton to testify that deceased had made statements to him different from the dying declarations, said witness being unable to state the substance of said variant statements. To permit the witness to so testify would have been permitting him to state merely his conclusions.

Bill of exception No. 6 does not state facts which show that error was committed in rejecting the proposed testimony of the witnesses Stinson and Ridding as to statements made by Mrs. Whitefield. Said proposed testimony would not be admissible except for the purpose of impeaching the credibility of Mrs. Whitefield as a witness, and the bill does not show that a proper predicate had been laid for the introduction of said testimony for said purpose. It was permissible for the defendant, in the cross-examination of Mrs. Whitefield, to lay a predicate for the purpose of impeaching her credibility by proof of statements made by her contradictory of her testimony, and if she denied making such statements, it was then competent to prove that she had made them; but the bill of exception does not show that any predicate was laid.

We are of the opinion that the evidence fairly presents the issue of self-defense as to this defendant. It shows that defendant's brother was in an angry and violent struggle with the deceased; that deceased during the struggle attempted to possess himself of a club, — a deadly weapon, — with the apparent intention of using it upon defendant's brother, and it was at this juncture that the defendant interposed, secured the club, and struck or attempted to strike the deceased with the same. Up to this act of his it does not appear from the evidence that he engaged in any way in the difficulty between his brother and the deceased. It does not appear that he knew that his brother was using or intending to use a knife in the conflict. It does not appear that he knew or had reason to believe that his brother intended to kill the deceased, or to inflict upon him serious bodily injury. On the contrary, the evidence tends to show that the appearances indicated to him that his brother and the deceased were merely engaged in a contest with their fists, neither using or attempting to use a deadly weapon.

Such being the state of the case when the deceased attempted to possess himself of the club with the apparent purpose of using the same upon his brother, the defendant was justified in interfering in defense of his brother, and in secur-

ing the club, and even in striking or attempting to strike the deceased with it if necessary to prevent the deceased from getting and using it. It is not the intent which actuated the defendant's brother, but the intent with which the defendant acted, which constitutes the criterion in passing upon the issue of guilt in this case. "According to his own act and intent does the law measure him, and hold him guilty of murder, or of manslaughter, or entirely justifiable, as the facts may warrant," and the intent of his brother is immaterial, unless it be shown that the defendant knew, or might reasonably have known, such intent: *Guffee v. State*, 8 Tex. App. 187; *Sterling v. State*, 15 Tex. App. 249; *Dyson v. State*, 14 Tex. App. 454; *Foster v. State*, 8 Tex. App. 248; *Kemp v. State*, 11 Tex. App. 174; *North v. State*, 12 Tex. App. 111.

In his charge to the jury the learned trial judge did not submit the issue of self-defense. No instruction whatever was given to the jury relating to self-defense, and because of the omission to submit said issue, and to properly instruct the jury in relation thereto, the charge of the court is fundamentally defective and insufficient: *Bell v. State*, 17 Tex. App. 538; *Meuly v. State*, 26 Tex. App. 274; 8 Am. St. Rep. 477; and for this reason the judgment is reversed, and the cause is remanded.

HOMICIDE — DYING DECLARATIONS AS EVIDENCE. — A dying declaration made before the deceased was conscious of his condition is admissible in evidence if affirmed after he became conscious of his approaching end: *State v. Ferguson*, 2 Hill, 619; 27 Am. Dec. 412, and note. If one has given up all hope of life, his declaration is admissible, even though it is not so stated therein: *State v. Wilson*, 24 Kan. 189; 36 Am. Rep. 257. The fact that death did not occur for some time after the dying statement will not make any difference, if made under fear of impending death: *People v. Vernon*, 35 Cal. 49; 95 Am. Dec. 49, and extended note; *Commonwealth v. Cooper*, 5 Allen, 495; 81 Am. Dec. 762, and note; *Shell v. State*, 88 Ala. 14; *Pulliam v. State*, 88 Ala. 1. Dying declarations, to be admissible, must be made under a fear of impending death, and with no hope of recovery: *Westbrook v. People*, 126 Ill. 84; *State v. Johnson*, 26 S. C. 152; *Vaughan v. Commonwealth*, 86 Ky. 431; *Archibald v. State*, 122 Ind. 122; *Walton v. State*, 79 Ga. 447. If a man is told by his physician that he cannot recover, and has confidence in him, though he may not himself believe that he is going to die, his declarations made under those circumstances are admissible: *State v. Wensell*, 98 Mo. 137.

HOMICIDE IN DEFENSE OF ANOTHER. — If a father kills the husband of his daughter while he is inflicting cruel and inhuman punishment upon her, endangering her life, the offense is manslaughter: *Campbell v. Commonwealth*, 88 Ky. 402; 21 Am. St. Rep. 348, and note. See note to *Stanley v. Commonwealth*, 9 Am. St. Rep. 308.

LINCECUM v. STATE.

[29 TEXAS APPEALS, 323.]

CRIMINAL LAW. — EVIDENCE OF THE GENERAL CHARACTER OF THE DEFENDANT is admissible in his favor, in all criminal cases in which intent is necessary to constitute the offense with which he is charged.

CRIMINAL LAW. — EVIDENCE OF THE GENERAL REPUTATION OF THE ACCUSED AS THAT OF A PEACEABLE AND LAW-ABIDING MAN is admissible in his favor when he is on trial charged with rape committed by assault and force.

CRIMINAL LAW. — A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE should be granted, when the accused has been convicted of rape, and the newly discovered evidence is such as might have led the jury to doubt whether the crime could have been committed as stated by the prosecutrix.

J. G. Cook, and Leake, Shepard, and Miller, for the appellant.

W. L. Davidson, assistant attorney-general, and *J. M. Duncan*, for the state.

WHITE, P. J. This is an appeal from a judgment of conviction for rape.

On the trial, the defendant offered to prove, by the sheriff of Lampasas County, and also by another witness, that they were acquainted with his general reputation in the neighborhood where he lived as "a peaceable man" and "a law-abiding man." Objection to this evidence, as made by the state, was, that the inquiry should be limited to his general character for chastity and morality. This objection was sustained and the evidence excluded.

"While a defendant's character is presumed to be good until it is impeached, it is always admissible for him to prove that his character was such as to make it unlikely that he would have perpetrated the act charged upon him." "And the character he is entitled to prove must be such as would make it unlikely that he would be guilty of the particular crime with which he was charged": Wharton's Crim. Ev., 9th ed., secs. 57, 60; 3 Am. & Eng. Ency. of Law, 110 et seq.

Mr. Bishop says: "Probably by all opinions it is competent to give evidence as to the particular trait of character which the indictment impugns. And some deem the inquiry should be limited to such trait, it being obviously irrelevant and absurd, on a charge of stealing, to inquire into the prisoner's loyalty; or on a trial for treason, to inquire into his character for honesty in his private dealings. But by the better reason-

ing, and according to what is common in practice, in at least part of the states, whilst this consideration should not be wholly disregarded, the evidence as to character is permitted a wider range. Goodness and wickedness do not flow altogether in channels, and one of good character in general is less likely to commit a particular wrong than one of bad character in general": 1 Bishop's Crim. Proc., 3d ed., sec. 1113; see also 9 Crim. Law Mag. 444 et seq.

In *Jones v. State*, 10 Tex. App. 552, it was held that "in criminal prosecutions, where guilty knowledge or criminal intention is of the essence of the offense, it is competent for the defendant to put his general character in evidence with respect to the offense charged against him." That was a case of rape.

In *Johnson v. State*, 17 Tex. App. 565, which was a case of assault with intent to rape, the extent of the issue presented as to character by the defendant was, that his reputation was good as "a peaceable negro, and one who was always polite to white people, especially to ladies"; and it was held that it was error to permit the prosecution to investigate the defendant's general reputation as "a law-abiding man," when he had not put it as such in issue. It was not decided in that case that the defendant could not have put in issue his character as "a law-abiding man," but only that defendant, not having done so in the first instance, the state could not do so. "The prosecution is not allowed to call witnesses to the general bad character of the prisoner unless to rebut the evidence of his good character already adduced by the prisoner": *Coffee v. State*, 1 Tex. App. 548; citing 3 Greenl. Ev., sec. 25; 2 Russell on Crimes, 704, 786; 1 Phillipps on Evidence, 469; 1 Bishop's Crim. Proc., 3d ed., sec. 64. It is not competent for the prosecution to go into the inquiry until the defendant has voluntarily put his character in issue, and in such case there can be no examination as to particular facts: *Commonwealth v. Hardy*, 2 Mass. 317; *Commonwealth v. Webster*, 5 Cush. 324; 52 Am. Dec. 711.

In the case under consideration, the defendant was charged with rape committed by assault and by force. The crime carries with it as an essential element a criminal intent to do the act by assault with force, and without the consent of the injured female. "In all criminal cases, whenever a criminal intent is necessary to constitute the offense, evidence of the general character of the defendant is admissible in his behalf": *Lann v. State*, 25 Tex. App. 495; 8 Am. St. Rep. 445.

In *Matthews v. State*, 32 Tex. 117, evidence of character was rejected as irrelevant to the issue, in a trial for assault and battery, the admission of such evidence being held to be in the discretion of the court, and it being invariably admissible only in cases where the life of the prisoner is involved. Such is not the law as we understand it. Mr. Bishop says: "This evidence is admissible in all offenses, the high and low alike," where the defendant's character is in any manner fairly involved: 1 Bishop's Crim. Proc., 3d ed., sec. 1114; 2 Lead. Crim. Cas., 2d ed., 351, and note.

In all cases where an accused is charged with personal violence upon another, he should be permitted to prove his general character for peace and quiet,—that is, that he is a peaceable man: *Commonwealth v. Mitchell*, 1 Brewst. 563; *Sawyer v. People*, 1 N. Y. Crim. Rep. 249; *Walker v. State*, 102 Ind. 502.

The case of *State v. Lee*, 22 Minn. 407, 21 Am. Rep. 769, was a rape case, and it was there held that "quiet and peaceable character" may be proved in defense to an indictment for rape.

Guided by the light and reason of the authorities cited, we are of opinion the court erred in rejecting defendant's proffered evidence as to character.

One of the defendant's grounds of motion for new trial was the newly discovered evidence of one Hubert Robinson. The testimony of the prosecutrix was, that the rape was committed upon her on the public road; that defendant stopped his buggy in a ravine and ravished her in the buggy. Robinson swears that he was hunting horses near the said road; that he saw the defendant and a lady in a buggy pass the road not seventy-five yards from him; that ten minutes afterwards he came into the same road, going in the same direction and traveling at about the same rate of speed they did; that when he passed the house of Rogers, near where the prosecutrix said the rape occurred, he saw a buggy with top up in the same road about three quarters of a mile ahead of him. He says that he, Robinson, traveled on behind Lincecum and the lady; that he did not see them stop anywhere on the road, and that if they had stopped any length of time, he, Robinson, would have seen them while they were stopped, if they stopped at all.

We think the evidence important, in view of the facts in the case. The jury, if such evidence had been before them, might have doubted if the rape could have been accomplished

as stated by the prosecutrix, and the buggy have had time to go three quarters of a mile beyond the place of the crime at an ordinary gait in the space of ten minutes,—the time the buggy was out of sight of the witness Robinson.

We are of opinion that the court should have granted a new trial on account of this newly discovered evidence, and that it was error to refuse it.

For the errors discussed, the judgment is reversed and the cause remanded.

CRIMINAL LAW—EVIDENCE OF GOOD CHARACTER AS A DEFENSE.—Evidence of general good character of an accused is admissible in his behalf, where a criminal intent is necessary to constitute an offense: *Lann v. State*, 25 Tex. App. 495; 8 Am. St. Rep. 445, and note; *State v. Barth*, 25 S. C. 175; 60 Am. Rep. 496, and note; *State v. Lindley*, 51 Iowa, 343; 33 Am. Rep. 139; *Hopps v. People*, 31 Ill. 385; 83 Am. Dec. 231, and note; *Reddick v. State*, 25 Fla. 112; *State v. Douglass*, 44 Kan. 618; *State v. Howell*, 100 Mo. 628.

QUINTANA v. STATE.

[29 TEXAS APPEALS, 401.]

APPELLATE PRACTICE.—AN EXCEPTION to the charge of the court, which does not assign any reason for the exception, nor point out the respect in which the charge is claimed to be incorrect or insufficient, will not be considered on appeal.

APPELLATE PRACTICE.—A BILL OF EXCEPTIONS should be so full in its statements that the errors complained of appear from the allegations of the bill itself.

JURY TRIAL—APPELLATE PRACTICE.—Instructions of the court on the defense of an *alibi* should be given when there is any evidence to support it, but the omission to give such instructions will not cause a reversal, unless special instructions upon the subject were asked and refused, or the omission of the court to charge upon it was excepted to at the time.

CRIMINAL LAW—DEFENDANT AS A WITNESS.—If the accused voluntarily testifies in his own behalf, he occupies the same position as any other witness, is liable to be cross-examined as to any matters pertinent to the issue, may be contradicted and impeached as any other witness, and is to be subjected to the same tests. He may, therefore, be impeached by proof that while in jail he made statements in conflict with his evidence as given at his trial.

CRIMINAL LAW.—CONFESSIONS MADE UNDER SUCH CIRCUMSTANCES THAT THEY ARE NOT ADMISSIBLE against defendant as original evidence may nevertheless be proved for the purpose of impeaching the evidence given by him when he has voluntarily offered himself as a witness and testified in his own favor.

No brief for the appellant.

R. H. Harrison, assistant attorney-general, for the state.

DAVIDSON, J. Appellant was tried and convicted for bringing a stolen horse into this state, after having committed the theft of said horse in the territory of New Mexico, and his punishment assessed at five years' confinement in the penitentiary. From this conviction an appeal is prosecuted to this court.

There is a bill of exception reserved to the charge as an entirety, in which the only objection urged is thus stated: "Because the same did not instruct the jury fully upon the law governing in this case under the facts proved." The court's qualification of this bill of exception is thus stated: "When the charge was read to the jury, the defendant's attorney excepted to the charge without assigning any reason." We are not call upon to consider this exception. "Bills of exception, when too indefinite to point out distinctly the matter complained of as error, will not bring such matter properly before the court for review": *Smith v. State*, 22 Tex. App. 316; *Williams v. State*, 22 Tex. App. 497. The primary object or purpose of a bill of exception reserved to a charge of the court is, to call the attention of the trial judge to the particular matter complained of, so that he may be afforded an opportunity to correct any error he may have fallen into, to the end that the rights of the defendant may not be prejudiced. A general exception does not accomplish this. Another reason why the bill of exception should point out specifically the errors complained of is, to enable this court to ascertain what error was committed without having to examine other portions of the record. This is not done by a general exception. The bill must be so certain and full in its statements that the errors complained of are made to appear by the allegations of the bill itself: Willson's Crim. Stats., sec. 2368. Tested by these rules, the bill is insufficient to bring before this court any supposed errors in the charge which are calculated to injure the rights of the defendant: *Smith v. State*, 22 Tex. App. 316; *Mace v. State*, 9 Tex. App. 110; *Smith v. State*, 15 Tex. App. 139; *Lewis v. State*, 18 Tex. App. 401. Viewing the entire case and charge as presented, we do not see that defendant was injured in any way by the court's charge.

In the motion for new trial, it is alleged that error was committed by the court, in that the court failed to charge upon the law of *alibi*. There was some testimony going to show that defendant was at or near El Paso at the time of the commission of the theft, some miles away, in the territory of New

Mexico. Where the defendant relies upon evidence going to prove an *alibi*, the trial court should usually charge upon that theory. Such has been the decision of the law by this court in several cases: *Deggs v. State*, 7 Tex. App. 359; *McGrew v. State*, 10 Tex. App. 539; *Long v. State*, 11 Tex. App. 381; *Granger v. State*, 11 Tex. App. 454; *Ninnon v. State*, 17 Tex. App. 650; *Hunnicutt v. State*, 18 Tex. App. 498; 51 Am. Rep. 330. But the omission of the trial court to charge with reference to *alibi* is not such error as will, ordinarily, cause a reversal of the conviction, unless the charge be excepted to because of such omission, or unless special instruction upon that subject be requested and refused: *Davis v. State*, 14 Tex. App. 645; *McAfee v. State*, 17 Tex. App. 131; *Clark v. State*, 18 Tex. App. 467; *Ayers v. State*, 21 Tex. App. 399. "We are not aware of any statute or decision which requires the trial court to instruct the jury specially upon this defense when not requested to do so. It is sufficiently embraced, we think, in the general charge that the defendant is presumed by the law to be innocent until his guilt is established by competent evidence beyond a reasonable doubt": *Davis v. State*, 14 Tex. App. 645. The court charged the jury that before they could convict defendant they must "believe from the evidence, beyond a reasonable doubt, that the defendant, in the territory of New Mexico, on July 4, 1890, did then and there fraudulently take the horse mentioned in the indictment from the possession of J. H. Bailey, without his consent"; that Bailey was the owner of the horse; and that defendant took said horse with the intent at the time of the taking to deprive the owner of the value of the same, etc. The court further charged, in this connection, the law of circumstantial evidence fully and favorably to defendant. There was no error committed by the court in failing to charge upon the theory of *alibi*.

Defendant took the stand as a witness, and testified in his case that he had never had possession of the horse alleged in the indictment to have been stolen. The district attorney, on cross-examination of the defendant, asked him if he had not stated to the witness Bailey that he (defendant) had had possession of said horse, and that he had gotten same from another Mexican in El Paso County, near Mundy's Springs. Defendant replied that he had not so stated, whereupon Bailey was brought on the stand and testified that defendant had so stated to him in the presence of defendant's counsel. It is further shown that this conversation occurred in jail, at El

Paso, and that the witness Bailey went to see defendant at the request and in company with one McGinnis, defendant's counsel, and the conversation occurred during that visit. The court, in qualifying the bill of exception, says that "defendant, by his attorney, objected, on the ground that defendant was in jail at the time." The court admitted the testimony, holding that when defendant made a witness of himself the same rules were open to the state to impeach his testimony as any other witness. There were other objections that will be noticed further on. In this holding the court committed no error. Whether defendant was in jail or not is not material. This question to some extent involves a construction of the act of 1889, which provides "that exception 4 to article 730, chapter 7, title 8, of the Code of Criminal Procedure of the state of Texas, be and the same is hereby repealed, and that hereafter any defendant in a criminal action shall be permitted to testify in his own behalf therein, but a failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause; provided, that where there are two or more persons jointly charged or indicted, and a severance is had, the privilege of testifying shall be extended only to the person on trial." "Sec. 2. Whereas the law as it now exists prohibits defendants in criminal actions from testifying therein, thereby often suppressing a knowledge of all the facts in the cause, therefore an imperative public necessity and emergency exists requiring that the constitutional rule which requires all bills to be read on three several days be suspended, and that this act take effect from its passage, and it is so enacted": Acts 1889, p. 3. The requisite number of votes failed to carry the emergency clause, and it became a law ninety days after the adjournment of the legislature.

Some phases of this law have already been passed upon by this court, but the question as to the extent of the cross-examination, etc., of the defendant as a witness has not been before the court prior to this time. This is the question at issue under appellant's bill of exception. By the repeal of section 4 of article 730 of the Code of Criminal Procedure, and the provisions of the act of 1889, a defendant has the right or privilege of testifying in his own case. When he takes the stand as a witness, he, for the time being, to some extent at least, loses his identity as a defendant, and becomes a witness

in the case. He is not compelled to testify, and his failure to do so cannot be urged against him, and counsel are prohibited from alluding to such failure on his part to testify. Should state's counsel so far forget the provisions of this law as to allude to or comment on the defendant's failure to testify in his own behalf, that matter will constitute reversible error: *Hunt v. State*, 28 Tex. App. 149; 19 Am. St. Rep. 815. The act leaves it discretionary with the defendant on trial whether he will or will not become a witness, and it forbids his being compelled to do so against his consent. Such is the construction given kindred legislation in every state in the Federal Union where defendants have the privilege of testifying in their cases when charged with crime.

The following and other states have at one time or another adopted statutes essentially like the act of 1889 above quoted, to wit: Nevada, New York, California, Massachusetts, Indiana, Connecticut, New Hampshire, and Tennessee. In all of these states the decisions are practically harmonious to the extent of holding that when a defendant, at his own option, under such a law as the act of 1889, becomes a witness, he occupies the position of any other witness, is liable to be cross-examined as to any matter pertinent to the issue, may be contradicted and impeached as any other witness, and is to be subjected to the same tests: *State v. Clinton*, 67 Mo. 380; 29 Am. Rep. 506 et seq. See the authorities collated in this case; *State v. Cox*, 67 Mo. 392; *State v. Rugan*, 68 Mo. 214; *Peck v. State*, 86 Tenn. 259; *McDonald v. Commonwealth*, 86 Ky. 10; *State v. Bulla*, 89 Mo. 595; Wharton's Crim. Ev., 9th ed., 429, 431, 433. See authorities collated in *Peck v. State*, 86 Tenn. 259. In the last-cited case we find this language: "It is earnestly insisted that such ruling operates to destroy the elementary principles of law; that the state cannot go into proof of the general character of the accused until he first opens the door. The contention is not logical; the general rule remains unaffected. The accused is still safe from such an attack as long as he remains the accused only; but when he voluntarily places himself upon the stand he assumes the character of a witness, and, as such, must expose himself to be attacked to the same extent as other witnesses. Surely the courts would be slow to place a construction upon an act of the legislature (if there were room for construction) that would allow a witness to be sworn and give his testimony against that of a good and true man, when the state's

attorney knows and is ready to prove him wholly devoid of moral sense and utterly unworthy of belief, and at the same time prevent the state from showing the character of the witness as affecting his credit. Under this act a man repeatedly convicted of the crime of perjury can go before the jury, in a community where he is unknown, and with a good manner and fair exterior give evidence in his own behalf, and the state remain powerless to impeach him, if the position contended for were tenable. Prior conviction of an infamous crime does not incapacitate him as a witness": *Peck v. State*, 86 Tenn. 259; *Newman v. People*, 63 Barb. 630; *Wilman v. State*, 28 Tex. App. 301; *Shannon v. State*, 28 Tex. App. 474. "A defendant, when a witness, may be contradicted as to matters material to the issue, but not as to matters collateral. So, as we have seen, he may be contradicted by proof of prior inconsistent statements, and this without previously questioning him as to such statements": Wharton's *Crim. Ev.*, 9th ed., 433, and notes thereto. "But if he puts himself on the stand as a witness in his own behalf, and testifies that he did not commit the crime imputed to him, he thereby waives the constitutional privilege, and renders himself liable to be cross-examined upon all the facts relevant and material to that issue, and cannot refuse to testify to any facts which would be competent evidence in the case if proved by other witnesses": 4 *Crim. Law Mag.* 336; *Commonwealth v. Lannan*, 13 Allen, 563; *Commonwealth v. Mullen*, 97 Mass. 545.

"The object of these statutes is, not to protect criminals, but to promote the discovery of truth, so far as it can be done without infringing the constitutional rights of the subject. If the accused chooses not to be a witness, he cannot be compelled to testify, and no inference prejudicial to him is to be drawn from his silence": 4 *Crim. Law Mag.* 336; *Commonwealth v. Harlow*, 110 Mass. 411. "When a party chooses to take the stand as a witness in his own behalf, it is not only proper, but may become the duty of the court, to interrogate him as fully as may be needful to test the truth of his direct evidence or testimony": *Gill v. People*, 5 Thomp. & C. 308; *State v. Ober*, 52 N. H. 459; 13 Am. Rep. 88. "Where a party is both witness and defendant, he must be held as waiving the privilege as to any matter about which he has testified in chief. Having testified to a part of the transaction in which

he is involved, he may be compelled to state the whole truth": *Roddy v. Finnegan*, 43 Md. 490.

It will be seen, then, that when a defendant assumes the role and character of a witness, he is subject to all the tests and rules applicable to other witnesses, even to the answering of questions that would tend to criminate him. "Being sworn to tell the truth, the whole truth, and nothing but the truth, he waived all right to keep anything back, even in the case of questions the answers to which would tend to criminate himself": *Commonwealth v. Tolliver*, 119 Mass. 315; *Commonwealth v. Lannan*, 13 Allen, 563; *Commonwealth v. Mullen*, 97 Mass. 545; *Commonwealth v. Bonner*, 97 Mass. 587; *Commonwealth v. Nichols*, 114 Mass. 285; 19 Am. Rep. 346. "He may be examined as to conflicting statements made by him, like any other witness, as to the transactions involved in his evidence. The inquiry may be gone into as a means of his impeachment as a witness": *Commonwealth v. Tolliver*, 119 Mass. 315, 316; *Day v. Stickney*, 14 Allen, 255.

Defendant had testified that he had no connection with or possession of the horse in question in El Paso County. To impeach him, and to show his contradictory statement, Bailey was permitted to testify that defendant told him, while in jail, that he (defendant) had had possession of the horse in El Paso County, and had received same from another Mexican. This was proper and legitimate, and the court committed no error in overruling the objections thereto.

It was urged as an objection that said statement of defendant to Bailey "was a confession made while in jail, without being warned, and was evidently made in the hope of immunity, and because it was not competent to impeach defendant by statements so made by him while in jail." Two of the grounds of objection have been already disposed of. That he expected immunity does not affect the admissibility of, but might affect the weight to be attached to, the evidence: 4 Crim. Law Mag. 331, 332, and authorities there cited. That it may have been a confession would not constitute a reason why he should not so testify: Authorities already cited. This position is not in conflict with the provisions of the terms of article 750 of the Code of Criminal Procedure, with reference to the confessions of a defendant under arrest. It is expressly provided by the Code of Criminal Procedure that a "defendant to a criminal prosecution for any offense may

waive any right secured to him by law, except the right of trial by jury in a felony case": Willson's Crim. Stats., sec. 1469. The provisions of article 750 can be waived by a defendant by his not urging the same, when the confessions are sought through the mouths of other witnesses than himself. They may testify to these interdicted confessions, and he cannot be heard to complain unless he urge his objections. Certainly, if he go upon the stand himself as a witness and testify as to matters contradictory of his statements while under arrest, the statements made by him while so under arrest can be used to impeach him. It is not intended here to pass on the question of the admissibility of his confessions or statements when sought to be used as original evidence against him. That question is not involved in the matters now before us. When defendant went upon the stand as a witness, he waived his attitude and position in the case as a defendant, and assumed that of the witness, and having done so, must abide the consequences of his election.

But the statement made to Bailey by defendant was not a confession. It did not admit his guilt of the offense charged. If it had been original testimony used against him, it would have been the account given by him of his possession of property recently stolen, provided the other concomitants were present to authorize its admission as such account. But in this case it admitted no guilty possession, but expressly excluded that idea. The crime is charged to have been committed partly in New Mexico, and partly in Texas. The statement of defendant to Bailey excluded the idea that the defendant ever had any connection with the horse in New Mexico. His statement was, that he received the horse from another Mexican, in Texas, at Mundy's Springs. It was held by this court in Willard's case, that an offer by the defendant to pay for the cow with which he stood charged or was accused of stealing was not a confession, and could not be even regarded as a circumstance tending to establish defendant's guilt of the theft: *Willard v. State*, 26 Tex. App. 126. See also *Eckert v. State*, 9 Tex. App. 105; *Weathersby v. State*, 29 Tex. App. 278. Instead of being an admission or confession of guilt, the statement of the defendant was a denial of that fact. If he received the horse from another Mexican in El Paso County, he could not have been guilty of theft of the horse in New Mexico, even if he knew that the horse was stolen when he received it. If he received the

horse from the other Mexican innocently, in that case he could not be guilty of any offense.

As presented to us, we find no error requiring a reversal of the judgment, and it is therefore affirmed.

HURT, J., dissented, upon the ground that the statute giving the defendant the right to testify in his own case did not repeal the law excluding defendant's confession, and insisted the authorities cited were not applicable, because in those states from whose reports they were cited there were no statutes similar to article 750 of the Code of Criminal Procedure of Texas, or if they had such statutes, the question was not raised in the cases cited.

WITNESS — DEFENDANT AS WITNESS — RIGHT OF IMPEACHMENT. — The defendant in a criminal case, who has offered himself as a witness, is liable to be impeached as to his general reputation, just as any other witness: *People v. Bentley*, 77 Cal. 7; 11 Am. St. Rep. 225, and note. See note to *People v. Mullings*, 17 Am. St. Rep. 230, where the cases on this subject are collected.

PUTNAM v. STATE.

[29 TEXAS APPEALS, 454.]

SEDUCTION BY MEANS OF A PROMISE TO MARRY is committed if the man has carnal intercourse to which the woman's assent was obtained by a promise of marriage, made by the man at the time, and to which, without such promise, she would not have yielded.

TO SEDUCE means, when used with reference to the conduct of a man towards a female, an enticement of her on his part to surrender her chastity by means of some art, influence, promise, or deception calculated to accomplish that object, and to include the yielding of her person to him as much as if it was expressly stated.

SEDUCTION — INSTRUCTIONS. — A conviction for seduction will be reversed if the judge did not fully instruct the jury concerning the meaning of the word "seduction" as used in the statute.

CONVICTION for seduction. No objection was made to the charge to the jury, either for insufficiency or incorrectness, nor was any additional charge asked for. The charge, or so much of it as is considered in the opinion of the court, was as follows: "If from the evidence before you in this case you are satisfied beyond a reasonable doubt that in Dallas County, Texas, at any time within three years next before September 14, 1889, the defendant, S. B. Putnam, did seduce Amanda Ray, by a promise to marry her, and by means thereof did obtain and have carnal knowledge of her, the said Amanda Ray, and you further find that at the time said Amanda Ray was under the age of twenty-five years, and was unmarried, you will find him guilty as charged, etc. To justify a conviction in this case,

you must be satisfied beyond a reasonable doubt that the carnal knowledge of Amanda Ray by defendant was first obtained by reason of a promise on his part to marry Amanda. If you are satisfied that such carnal knowledge was the result of mutual desires on the part of the defendant and Amanda Ray, and was had without any promise of marriage by defendant to Amanda, then the defendant, under the law, would not be guilty."

W. F. Short, for the appellant.

R. H. Harrison, assistant attorney-general, for the respondent.

WHITE, P. J. This prosecution and conviction in the court below was for the crime of seduction.

Our statutory provisions, in so far as they are involved in the questions submitted on the appeal here presented, are: "If any person, by promise to marry, shall seduce an unmarried female under the age of twenty-five years, and shall have carnal knowledge of such female, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years, or by fine not exceeding five thousand dollars": Pen. Code, art. 814.

"The term 'seduction' is used in the sense in which it is commonly understood": Pen. Code, art. 815.

Mr. Webster defines "seduction" to be "the act of seducing or of enticing from the path of duty; specifically, the act or crime of persuading a female to surrender her chastity; 2. That which seduces, or is adapted or employed to seduce; means of leading astray," etc.

The word "seduction" is derived from two Latin words, *se*, which means "away," and *duce*, which means "to lead"; and together they mean "to lead away."

"Seduction," then, implies that the female is led away from the paths of rectitude and virtue, and induced to indulge in carnal intercourse by the means used. "Generally, in order to establish the charge of seduction, it must be made to appear that the intercourse was accomplished by some artifice or deception; and it is held that something more than a mere appeal to the lust or passion of the woman must be shown before the law will inflict the penalty prescribed for that crime": *State v. Fitzgerald*, 63 Iowa, 268.

Our statute expressly provides that the seduction must be accomplished by means of a "promise to marry." As was said in *People v. De Fore*, 64 Mich. 693, 8 Am. St. Rep. 863:

"Under this statute, the offense is committed if the man has carnal intercourse to which the woman assented, if such assent was obtained by a promise of marriage made by the man at the time, and to which, without such promise, she would not have yielded: *People v. Millspaugh*, 11 Mich. 278. The offense consists in enticing a woman from the path of virtue, and obtaining her consent to the illicit intercourse by promises made at the time. . . . The promise, and yielding her virtue in consequence thereof, is the gist of the offense. If she resists, but finally assents or yields, induced thereto or in reliance upon the promise made, the offense is committed": *Boyce v. People*, 55 N. Y. 644.

Mr. Bishop, in his work upon statutory crimes (2d ed., p. 638), says: "Though the parties are already under marriage engagement, if the woman yields, not by reason of the man's promise of marriage, but simply for the gratification of a criminal desire, he does not commit the offense; yet the subsistence of the engagement does not render his act less a crime if she submits from reliance thereon." In the words of Bleckley, J. (*Wilson v. State*, 58 Ga. 328): "To make love to a woman, woo her, make honorable proposals of marriage, have them accepted, and afterward undo her under a solemn repetition of the engagement vow, is to employ persuasion as well as promise of marriage."

Under a statute quite similar to ours, where the language of the statute was, "If any person shall, under promise of marriage, seduce and debauch any unmarried female," etc., the supreme court of Missouri, in an able opinion by Sherwood, J., says: "There are two steps necessary to be taken in order to consummate the crime under discussion: 1. The female must be seduced, — that is, corrupted, deceived, drawn aside from the path of virtue which she was pursuing; her affections must be gained, her mind and thoughts polluted; and 2. In order to complete the offense, she must be debauched, — that is, she must be carnally known before the guilty agent becomes answerable to human laws." Thus it will be seen that a female may be seduced without being debauched, or debauched without being seduced. A similar view of the proper construction of a statute substantially identical with our own was taken in Pennsylvania, in *Commonwealth v. McCarty*, 2 Pa. L. J. 135, and cited with approval in *State v. Patterson*, 88 Mo. 88; 57 Am. Rep. 374; *State v. Reeves*, 97 Mo. 668; 10 Am. St. Rep. 349.

In *State v. Patterson*, 88 Mo. 88, 57 Am. Rep. 374, we find a definition of the statutory word "seduce," which commends itself to our minds as eminently correct. It is as follows: "The word 'seduce,' though a general term, and having a variety of meanings according to the subject to which it is applied, has, when it is used with reference to the conduct of a man toward a female, a precise and determinate signification, and is universally understood to mean an enticement of her on his part to the surrender of her chastity by means of some art, influence, promise, or deception calculated to accomplish that object, and to include the yielding of her person to him as much as if it was expressly stated"; citing *State v. Bierce*, 27 Conn. 319; *Dinkey v. Commonwealth*, 17 Pa. St. 126; 55 Am. Dec. 542.

As is pertinently said in *State v. Reeves*, 97 Mo. 668, 10 Am. St. Rep. 249: "No one can with any degree of plausibility contend that a virtuous female could be seduced without any of those arts, wiles, and blandishments so necessary to win the hearts of the weaker sex. To say that such a one was seduced by simply a blunt offer of wedlock *in futuro* in exchange for sexual favors *in præsenti* is an announcement that smacks to much of bargain and barter, and not enough of betrayal. This is hire or salary, not seduction."

In his charge to the jury in the case in hand, the learned trial judge did not sufficiently submit to the jury the law of seduction as it is well settled and established in accordance with the principles above announced. There was no explanation whatever of the legal term "seduction."

In *Cole v. State*, 40 Tex. 147, Moore, J., says: "The charge of the court would have been more satisfactory if the inducement to commit the unlawful act with the defendant had been more fully explained. The jury might not have understood fully the nature of the accusation and the facts that must be proved to warrant a conviction. The term "seduction," when used in the sense in which it is commonly understood, does not convey the full meaning of the offense which is intended to be punished by the code."

That case was reversed for defects in the charge. The charge of the court in this case is objectionable for errors of omission to the same extent.

Because the charge of the court failed to submit sufficiently the law applicable to the case, the judgment is reversed and cause remanded.

SEDUCTION UNDER PROMISE OF MARRIAGE. — If a man has carnal intercourse to which the woman assented, if such assent was obtained by a promise of marriage made by the man at the time, and to which, without such promise, she would not have assented, he is guilty of seduction: *People v. De Fore*, 64 Mich. 693; 8 Am. St. Rep. 863, and note; *State v. Horton*, 100 N. C. 443; 6 Am. St. Rep. 613, and note; *Callahan v. State*, 68 Ind. 198; 30 Am. Rep. 211; *Kenyon v. People*, 26 N. Y. 203; 84 Am. Dec. 177, and note; *State v. Primm*, 98 Mo. 368; *State v. Abrisch*, 41 Minn. 41.

SEDUCTION — WHAT IS. — Where a woman's consent to carnal intercourse is secured by a man through wiles, artifice, and deception, or any subtle device or deceptive means involving moral turpitude, he is guilty of the crime of seduction: *People v. Gibbs*, 70 Mich. 425; extended note to *People v. De Fore*, 8 Am. St. Rep. 870, where the various statutory definitions of seduction are discussed. See extended note to *State v. Carron*, 87 Am. Dec. 405.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

IN RE TUCKER'S WILL.

[63 VERMONT, 104.]

WILLS — "LAWFUL HEIRS," AT WHAT TIME TO BE ASCERTAINED. — Where a testator, by his will, gives his property to his sister during her life, and "at her decease, said estate to be distributed amongst my lawful heirs," the words "amongst my lawful heirs" have reference to the lawful heirs of the testator at the time of his death, and not to those who might be such at the time of the death of his sister, the tenant for life.

Lamb and Tarbell, and J. K. Darling, for the appellants.

D. C. Dennison and Son, for the appellee.

TAFT, J. After certain bequests, the testator gave to his sister, Diana, the use and occupancy of the residue of his estate during her natural life, and at her decease, directed that it should then be distributed among his lawful heirs. At his death, his father, Ezra Tucker, was living, and was his lawful heir. Ezra died before the decease of Diana, and the administrator of his estate claims the residue, as against the appellants, who were the lawful heirs, failing Ezra, at the time of Diana's death. The words of the will, "amongst my lawful heirs," had reference to those persons who were the lawful heirs of the testator at the time of his death, not those who might be such at the time of Diana's death. No estate will be held contingent unless very decided terms are used in the will, or it is necessary to so hold in order to carry out the other provisions or implications of the will: *Weatherhead v. Stoddard*, 58 Vt. 623. We think the right to the residue of the estate vested at the time of the testator's death in his

then heir, his father, Ezra Tucker, subject to the life estate of Diana, and that upon the latter's death, the administrator of the estate of Ezra is entitled to the property.

Judgment reversed, judgment for the appellee, and ordered certified to the probate court.

WILLS — HEIRS — AT WHAT TIME TO BE ASCERTAINED. — A bequest to A's children as a class embraces only those born or begotten at the death of the testator: *Collin v. Collin*, 1 Barb. Ch. 630; 45 Am. Dec. 420, and note; *Thompson v. Garwood*, 2 Whart. 287; 31 Am. Dec. 502. The words "heirs at law" mean those who are heirs at the death of the testator: *Whall v. Converse*, 146 Mass. 345; *Wallace v. Minor*, 86 Va. 550; *Church v. Church*, 15 R. I. 138. Death without issue means a dying without issue during the life of the testator: *Phelps v. Phelps*, 55 Conn. 359. See *Parkhurst v. Harrower*, 142 Pa. St. 432; 24 Am. St. Rep. 507; *Toole v. Perry*, 80 Ga. 681.

GIFFORD v. RUTLAND SAVINGS BANK.

[63 VERMONT, 108.]

SAVINGS BANKS — ASSENT BY DEPOSITOR TO BY-LAWS. — A depositor, by receiving and holding a deposit-book as his voucher against the bank, and continuing his relation of depositor without signing such book, as required by the by-laws printed therein, of which he has actual knowledge, will be deemed to have assented to them as a part of his contract of deposit.

SAVINGS BANKS — BY-LAW — REASONABLE REGULATION. — A bank by-law providing that the bank will not be liable for loss sustained when a depositor has not given notice that his deposit-book has been lost or stolen, and the deposit is paid in part or in full on presentation of such book, is a reasonable and proper regulation for the protection of the bank, and will protect it except where it fails to exercise reasonable care under facts sufficient to excite the suspicion of a prudent man and put him on inquiry.

SAVINGS BANKS — BY-LAW — NEGLIGENCE IN PAYING DEPOSIT TO THIEF. — Under a bank by-law assented to by the depositor, providing that "the institution will not be responsible for loss sustained, when a depositor has not given notice of his book being lost or stolen, if such book be paid in whole or in part on presentment," the bank is not liable for paying the amount of a deposit to one who has stolen the depositor's bank-book, presented it to the bank, and accounted for the manner in which the money was deposited, in a case where the money was deposited by letter, and the depositor has never been at the bank, is not known to its officers, who have never seen his signature, and have no notice of the loss of the book.

ASSUMPSIT to recover the amount of a deposit in bank. On December 27, 1884, one Rogers sent a check to the defendant bank for \$150, directing by letter that it be deposited to the credit of C. L. Gifford, the plaintiff. This was done

upon the books of the bank, and a deposit-book, containing the by-laws hereafter set forth, was issued and sent by mail to said Gifford. On December 8, 1885, Rogers sent a similar letter and check for \$250, accompanied with Gifford's deposit-book, to the defendant bank. The amount of the last deposit was entered upon Gifford's book, and the latter returned to him. He kept possession thereof until September 26, 1888, when the book was stolen by his brother and presented by him at the defendant bank. The bank paid him the amount of the deposit, under the circumstances detailed in the opinion. The material parts of printed by-laws contained in the deposit-book were as follows: "Art. 11. All deposits shall be entered in the treasurer's books, and duplicates given to each depositor, and each depositor, on his first deposit, shall subscribe his or her name to the book kept for that purpose, and shall by that act be considered as assenting to and being bound by all the by-laws and regulations of the corporation Art. 17. When any person shall receive either principal or interest, the original deposit-book or voucher shall be produced, that the payment may be entered therein; but in case of sickness or absence, the money may be paid to the written order of the depositor, accompanied by the book. . . . Art. 22. As the officers of the institution may be unable to identify every depositor transacting business at the office, the institution will not be responsible for loss sustained when a depositor has not given notice of his book being lost or stolen, if such book be paid in whole or part on presentment." Judgment for defendant and plaintiff appealed.

Joel C. Baker, for the appellant.

Edward Dana, for the appellee.

ROWELL, J. That the bank took plaintiff's deposits without requiring his assent to the by-laws by subscribing his name to the book kept for that purpose, as provided by the eleventh article, is not conclusive that he did not otherwise assent to them; for we do not regard that method of assent as intended to be the only method, but only one method.

The maxim that the express mention of one thing implies the exclusion of another is often exceedingly helpful in the construction of contracts, but great caution is necessary in dealing with it, for, as said by Lord Campbell in *Saunders v. Evans*, 8 H. L. Cas. 729, it is not of universal application, but depends upon the intention of the parties as discoverable

from the face of the instrument or the transaction: Broom's Legal Maxims, 653. Williams, J., in *Eastern Archipelago Co. v. Queen*, 2 El. & B. 879, says it is by no means of universal nor conclusive application; and he gives instances of its non-applicability.

Now, we discover nothing upon the face of this transaction that shows that it was the intention of these parties that plaintiff should be deemed to assent to the by-laws only by subscribing his name to said book; but quite the contrary appears. Both parties knew that plaintiff had not signed said book, but yet they continued to occupy to each other the relation that the deposits created, and presumably with the mutual intention that all the rights and incidents of that relation should attach to it, as it is not to be presumed that they or either of them expected or intended that the non-compliance with one by-law should nullify the whole, but rather that the matter should stand as though that by-law did not exist. Hence by receiving and holding the deposit-book as his voucher against the bank, with the by-laws printed in it, of which the case shows he had actual knowledge, and continuing his relation of depositor, he must be taken thereby to have assented to the by-laws, save the one that he knew was not complied with, and to have agreed to them as a part of the contract of deposit. And so it has been elsewhere held: *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78; 88 Am. Dec. 194; per Ellsworth, J., in *Eaves v. People's Sav. Bank*, 27 Conn. 229; 71 Am. Dec. 59; *Goldrick v. Bristol Co. Sav. Bank*, 123 Mass. 320.

The by-law based upon the difficulty of identifying depositors doing business at the bank, which provides that the institution will not be responsible for loss sustained when a depositor has not given notice of his book's being lost or stolen, if it is paid in whole or in part on presentation, has often been held to be a reasonable and proper regulation for the protection of the bank: See the cases *passim*.

But this by-law does not relieve the bank from the exercise of reasonable care; and payment to the wrong person on presentation of the book, even before notice of its loss, will not exonerate the bank, if the attendant circumstances were sufficient to excite the suspicion of a prudent man, and put him on inquiry: *Sullivan v. Lewiston Inst. of Savings*, 56 Me. 507; 96 Am. Dec. 500; *Kimball v. Norton*, 59 N. H. 1; 47 Am. Rep. 171; *Levy v. Franklin Sav. Bank*, 117 Mass. 448; *Appleby*

v. *Erie Co. Sav. Bank*, 62 N. Y. 12; *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314.

It is a rule of frequent application, that one who has knowledge of facts sufficient to induce a prudent man to inquire in respect of other facts germane to the matter in hand will be charged with knowledge of such other and further facts as he might have learned by diligent inquiry in the right direction. But it is competent to rebut the presumption of such ascribed knowledge by showing the existence of other and attendant circumstances of a nature to allay his suspicion, and to lead him to believe that inquiry was not necessary.

A majority of the court think that the circumstances of this case are not such as to charge the bank with knowledge of any facts not learned at the time the money was paid.

The bank had not been notified of the loss of the book. The plaintiff had never been at the bank, and was not known to any of its officers. The thief was also unknown to them; but he came to the bank with the book in his possession, and that possession was apparently lawful; on inquiry, he answered truly that the money was sent by letter for deposit,—a statement well calculated to ward off suspicion, for the manner of sending, from its nature, was a fact peculiarly within the knowledge of those having to do with and interested in the deposit, and one that others would not be likely to know about.

Nor was there anything suspicious in the way the thief made the "L." Perhaps the plaintiff himself would have done no better. It is not suspicious that a man writes a name awkwardly. Many men write their own names that way, not to say illegibly.

Nor was the bank bound to require the thief to identify himself as the depositor further than he did by producing the book. There being no suspicious circumstances, the very terms of the by-law relieved it of that duty; and to require it would be to nullify the by-law, which is a part of the contract, and provides for just such a case as this.

Judgment affirmed.

SAVINGS BANKS — BY-LAW. — A clause in a deposit-book, to the effect that depositors alone are responsible for the safe-keeping of the book, must be taken to be a part of the contract between the bank and the depositor: *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78; 88 Am. Dec. 194. A by-law of a savings bank, to the effect that where a depositor loses his pass-book, and does not give the bank due notice of the loss, and the book is presented by

some one else representing himself to be the depositor, and money is paid such person, the bank will not be liable, is a reasonable regulation: *Burrill v. Dollar Sav. Bank*, 92 Pa. St. 134; 37 Am. Rep. 669, and note. Where such rule exists, the bank will not be held liable for paying money to such fraudulent person: *Donlan v. Provident etc. Institution*, 127 Mass. 183; 34 Am. Rep. 358; *Sullivan v. Lewiston etc. Institution*, 56 Me. 507; 96 Am. Dec. 500. If the depositor was not guilty of negligence in failing to notify the bank, and the bank did not use due care in paying the money, the bank would be liable: *Wegner v. Second Ward Sav. Bank*, 76 Wis. 243.

CLEVELAND v. PEARL.

[63 VERMONT, 127.]

SALES ARE PRESUMED TO BE FOR CASH on delivery, in the absence of proof to the contrary.

AGENCY. — **ONE DEALING WITH A SPECIAL AGENT** is bound, at his peril, to know the extent of the agent's authority.

AGENCY — SALE — PAYMENT BY CHECK OF AGENT. — Where the purchaser, at the time of sale, directs the seller to deliver the goods to the purchaser's agent, to whom he has given the money to pay cash, the seller, by taking the personal check of such agent in part payment, upon the delivery of the goods, thereby discharges the debt of the purchaser in full, and accepts the check at his peril, especially when the purchaser has been prejudiced by a settlement made by him with such agent, without notice of the execution of the check, or of its dishonor.

ASSUMPSIT for the price of wool. On June 16, 1888, the defendant Pearl purchased the plaintiff's wool under agreement that it should be delivered to one Hoyt, to whom defendant would furnish the money with which to pay for it upon delivery. On June 22, 1888, plaintiff delivered the wool to Hoyt, who had, in the mean time, received the money from defendant, with directions to pay cash for the wool on delivery. Hoyt paid for the wool partly in cash, and gave plaintiff his personal check for the balance. Plaintiff retained the check until June 26, 1888, when he indorsed and delivered it in payment of his debt to a third party. On July 6, 1888, the check was presented for payment at the bank on which it was drawn, when payment was refused, and the check protested, because of the insolvency of the maker, although Hoyt had funds in bank sufficient to meet the check up to and including July 3, 1888. The defendant had no notice of the execution of the check, or that the wool had not been paid for in cash, until notified by letter from plaintiff, dated July 9, 1888, that Hoyt's check had been protested. On June 26, 1888, defendant had settled with Hoyt, and had paid him a balance greater

than the amount of the check. The evidence was conflicting as to whether the plaintiff accepted Hoyt's check voluntarily and in preference to cash, or whether he insisted upon having the money, and only took the check when convinced that he could not get the money. The jury was instructed that if he took the check at Hoyt's request because of his inability to pay in full in money, he was entitled to recover. The defendants excepted and appealed.

L. H. Thompson, for the appellants.

C. A. Prouty, for the plaintiff.

ROWELL, J. It not having been found how it was in fact, this was in law a sale for cash on delivery. And it is manifest that the parties so understood it; for the defendants put Hoyt in funds wherewith to pay on delivery, and the plaintiff called for payment in money when he delivered. And when he found that he could not get cash in full according to his right, he had an option not to deliver at all. But he chose to deliver notwithstanding, and to take Hoyt's check, payable to himself, for the unpaid balance, in the giving of which Hoyt was not defendants' agent, for he was acting outside the scope of his authority, which was to pay cash down, and the plaintiff ought to have known it; but if he did not, the law will treat him just as though he did, for he who deals with an agent having only a special and limited authority, is bound, at his peril, to know the extent of his authority: *White v. Langdon*, 30 Vt. 599; *Sprague v. Train*, 34 Vt. 150.

By taking the check in the circumstances disclosed, — agreeing for his own convenience for delay in presenting it, and subsequently parting with it in payment of his debt, the defendants having been prejudiced, if liable here, by paying their debt to Hoyt in the mean time, when, had they known how it was, they could have paid the plaintiff and saved themselves, — the plaintiff must be deemed to have made the check his own, and to have accepted the credit and responsibility of Hoyt instead of that of the defendants, and to have discharged the latter. In other words, Hoyt's check paid the debt as between these parties.

The plaintiff stands no better than he would had he taken the check in preference to the money, or had given a receipt acknowledging payment, when he would certainly have discharged the defendants; for so are all the authorities.

The case is not like those in which the plaintiff had no option, and could do better than to take a bill or a note, and no injury resulted to the defendant in consequence of taking it. In such case the check is a conditional and not an absolute payment. *Robinson v. Read*, 9 Barn. & C. 449, is of that class.

But here was no antecedent debt, and the plaintiff had the staff in his own hands, and might have kept his wool; but he chose to deliver it, and to take Hoyt's check for it, without authority from the defendants or notice to them, and he has no standing to claim that the check was only conditional payment.

Judgment reversed and cause remanded.

PRINCIPAL AND AGENT. — AGENT'S AUTHORITY — DUTY OF ONE DEALING WITH, TO KNOW. — One dealing with an authorized agent is bound to inquire and ascertain the extent of his authority: *Busch v. Wilcox*, 82 Mich. 336; 21 Am. St. Rep. 563, and note; *Wachter v. Phoenix Assur. Co.*, 132 Pa. St. 428; 19 Am. St. Rep. 600; *Bond v. Pontiac etc. R. R. Co.*, 62 Mich. 643; 4 Am. St. Rep. 885, and note; *Coulter v. Portland Trust Co.*, 20 Or. 469; *Turner v. Lord*, 92 Mo. 113. See *Marsh v. Buchan*, 46 N. J. Eq. 595.

PARKER v. COTURE.

[63 VERMONT, 155.]

ASSAULT WITH INTENT TO RAVISH — EVIDENCE OF CHARACTER IN MITIGATION OF DAMAGES. — In trespass to recover damages for an assault with intent to ravish, evidence that the plaintiff was immodest and obscene in conduct and language is admissible in mitigation of actual damages.

Henry Ballard and A. G. Whittemore, for the appellant.

J. A. Brown, for the appellee.

ROWELL, J. This is an action of trespass for assault and battery with intent to ravish. The plaintiff recovered a hundred dollars, but whether anything was included for exemplary damage does not appear; and as such damages are not recoverable as matter of right, but only as matter of discretion, we cannot assume that any were allowed.

On the question of damages, the defendant offered to show that plaintiff was in the habit of obeying the calls of nature in her back yard in plain sight of his family, and that men and boys addressed obscene language to her without apparent offense on her part, but that she joined in the conversation. He said he was not able to prove acts of unchastity on her part, nor that she was of unchaste character.

Claim is made that it does not appear but that the offer related to a time so remote as to make the testimony inadmissible, though relevant. But a majority deem it as relating to a time sufficiently recent to give color to plaintiff's character in this respect at the time of the assault.

In civil cases, when character is material as affecting the amount of damages, plaintiff puts his character in issue as far as that question is concerned, and therefore evidence respecting it as to the particular in which it is claimed to have been injured is relevant.

Thus in slander for imputing adultery, defendant may show, in reduction of damages, that before and at the time of speaking the words plaintiff was commonly reputed to be an unchaste and a licentious man; and this as tending to show the value of the character for injury to which he seeks to recover: *Bridgman v. Hopkins*, 34 Vt. 532.

So in actions for seduction, as the parent recovers not only for loss of service, but for wounded feelings also, the defendant may show the loose character and conduct of the daughter.

So in trespass for assault and battery with intent to ravish, shock to the sensibility of modesty, and wounded feelings consequent thereon, constitute a peculiar and an important element of actual damages, and one of the principal grounds of awarding them; and therefore plaintiff puts her character in issue in this respect when she asks for damages on that score.

It cannot be said that a woman without modesty would suffer as much from an assault of this kind as a woman with modesty; and if it cannot be shown that the former has no modesty to shock, she is put on an equality with the latter, and may recover for injury to that which she does not possess: *Ford v. Jones*, 62 Barb. 484.

Judgment reversed and cause remanded.

ASSAULT WITH INTENT TO RAVISH — EVIDENCE OF UNCHASTITY OF PLAINTIFF. — In an action by a woman for assault with lecherous intent, evidence is inadmissible to show a former similar charge by her against another man and the acceptance of money in compromise: *Oyle v. Brooks*, 87 Ind. 600; 44 Am. Rep. 778. In an action for assault, it was sought to prove that the plaintiff was a low, bad woman, and it was held that this could only be done by proof of general bad character: *Ratteree v. Chapman*, 79 Ga. 574. In an action for seduction, evidence of plaintiff's unchaste character after the seduction is inadmissible: *Shewalter v. Bergman*, 123 Ind. 155.

KING v. WHITE.

[63 VERMONT, 158.]

PARTNERSHIP — ACCOUNTING — LACHES. — A partner who, after the dissolution of the firm, has acquiesced for several years in what was supposed by the partners at the time to be a full settlement of the partnership affairs will be refused an accounting in equity as against representatives of his partner, since deceased, on the ground that his claim is stale, although it is not barred by limitation, in the absence of a showing why an accounting was not asked during the lifetime of the deceased partner, or for the delay in bringing suit.

PARTNERSHIP — ACCOUNTING — LIABILITY OF DECEASED PARTNER'S ESTATE. — The estate of a deceased partner is liable for the proceeds of firm property left in his hands and disposed of by him after a dissolution and partial settlement of the partnership.

PARTNERSHIP — ACCOUNTING. — **SURVIVING PARTNERS MAY MAINTAIN** a bill for an accounting against the estate of their deceased partner, although their claim has been disallowed by the probate court.

William Batchelder and J. J. Wilson, for the appellant.

Gilbert A. Davis, for the appellees.

TYLER, J. The bill alleges a large indebtedness from Harlow's estate to the orators, and prays for a general accounting. The answer avers that Harlow in his lifetime accounted to the orators for all money received by him on account of the partnership, and paid over to them the amounts respectively their due; that the orators received and accepted the same, and never thereafter made claim to the contrary until long after Harlow's death.

The master reports that a copartnership was formed between the orators and Hiram Harlow, August 1, 1875, and terminated by a sale of most of the partnership property in September, 1877, some machinery remaining to be sold and some debts to be collected after the latter date. There was no formal dissolution. While the partnership continued, Harlow was its treasurer, financial manager, purchasing agent, and book-keeper. He owned the shop in which the business of manufacturing scythe-snaths was carried on, and furnished the capital for its prosecution. King had charge of the work of manufacturing and the payment of the employees, and the other three partners were laborers. They and King were each to have a dollar a day for services, and whatever profits might accrue from the business were to be divided equally among the five partners. Some dissatisfaction arose on the part of the Lacey, who desired and demanded a settlement, which was the occasion of Harlow's disposing of the property. The

books of the company were kept by Harlow at his private office, some distance from the shop, but the other partners were frequently at the office, and the relations among the five were friendly. There never was any agreement as to what compensation Harlow should have for his services, rent of shop, and use of capital, but the orators expected he would be paid a reasonable compensation, and he made such charges therefor upon the books as he thought best, and acted in good faith in making them.

It is not found that the books were improperly kept. Harlow was a skillful accountant, and the books showed the daily business of the firm, but the double-entry system adopted by him was such that persons unskilled in book-keeping, as the orators were, and lacking the particular knowledge of transactions which Harlow alone possessed, could not decide with any certainty whether the entries were properly made or not. There was no concealment by Harlow of his charges; by inquiry the orators might have obtained full knowledge in relation thereto. He was the only person who had any practical knowledge of the entries upon the books, and the orators were content to take his statements, and did not inspect the books themselves, or obtain information from him concerning the condition of the company.

In October, 1877, Harlow divided \$2,500 among the five partners, and in March, 1880, he made a further division of \$846.20, which the orators regarded as a final division and settlement of all the moneys that had then come into his hands.

The master finds that for some unexplained reason a balance of \$26.01 remained in Harlow's hands after the last division; that Harlow overcharged \$316.67 for rent, \$391 for services, \$145.54 for interest on capital furnished; that soon after March 1, 1880, he sold machinery for \$50, and in February, 1882, the remainder of the machinery for \$250. The master computes interest on the first four items from the time they appeared on the books to the time of hearing, and on the last two from the respective dates of sale until the same time, making the sum of \$1,867.57, which the defendants should account for to the orators.

It is found that on the day of the last division, Harlow made a charge on the books in his favor, "for transfer of accounts, services, rents, etc., all \$1,016," which was his first and only charge on book for services. While the company

was in business he charged nine hundred dollars for rent, which was five hundred dollars for the first year, and at the rate of three hundred dollars thereafter. What use of shops was intended to be included in the \$1,016 item does not appear.

King does not seem to have been in Windsor after September, 1877. The Laceys were in and about there a considerable portion of the time thereafter until March 1, 1880, but whether they were present at the division then made does not very clearly appear. The master says there was no direct evidence on that subject. He seems to infer that they were not present from the fact that they did not discover what he thinks a manifest error in the charge for rent. He says, however, "that, so far as they were concerned, knowledge of the progress made by Harlow in settling the firm's business was not lacking for want of opportunity to have applied to Harlow for such knowledge. . . . They knew of and consented to the division, however little knowledge they may have had of the manner in which it was made."

The orators evidently received their respective shares after the division without objection, and apparently with satisfaction. It does not appear that thereafter during Harlow's lifetime they made any inquiry of him relative to the basis of the division, or in any manner expressed dissatisfaction therewith.

The master submits to the court the question whether a recovery of what he finds to be overcharges is barred by the division and settlement; also whether it is barred by the disallowance by the commissioners upon Harlow's estate, and the acceptance by the probate court of the commissioners' report.

The difficulty there is in arriving at the truth when the party who made the entries is dead, and the others are disqualified by law from testifying, is apparent throughout this report. The master declares that the case is remarkable for the dearth of testimony on every material issue.

In *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, Lord Selborne says: "Where it would be practically unjust to give a remedy either because the party had done that which might fairly be regarded as equivalent to a waiver of it, or when, though not strictly having waived the remedy, he has yet put the other party in a situation in which it would not be reasonable to assert the remedy against him, — in either of these cases lapse of time and delay are very material."

Harlow's charge of five hundred dollars for first year's rent may illustrate. It was made in due course of business, and stood upon the books presumably with the orators' knowledge and approval; yet the master, twelve years later, without the testimony of any of the copartners, but from such evidence as could then be produced, finds the charge excessive.

A claim in equity ought to be exhibited within a reasonable time, that the court may not do injustice to the defendant: *Atkinson v. Robinson*, 9 Leigh, 393. There is no absolute rule. Length of time or long acquiescence in a transaction may be a bar to relief in cases where the transaction, if seasonably impeached, would be set aside. It is in some measure left to the discretion of the court, to be determined by the nature of the demand and the decree of inconvenience which its enforcement would occasion to the opposite party: *Rayner v. Pearsall*, 3 Johns. Ch. 586; *Story's Eq. Jur.*, sec. 1520, and notes.

In *Mooers v. White*, 6 Johns. Ch. 368, it was held that courts of equity would not permit accounts to be overhauled in favor of a party who had slept upon his rights without any just cause for a number of years, and more especially against the representative of a party who may be supposed to have had the means of defense in his lifetime, but who may have left his successors without the requisite vouchers.

In *McKnight v. Taylor*, 1 How. 168, Chief Justice Taney, using the language of Lord Camden in *Smith v. Clay*, 3 Brown C. C. 639, said there must be conscience, good faith, and reasonable diligence to call into action the powers of a court of equity. In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere, after a considerable lapse of time, from considerations of public policy, and from difficulty of doing entire justice when the original transactions have become obscure by time, and the evidence may be lost.

In *Badger v. Badger*, 2 Wall. 94, the court said: "Courts of equity, acting upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refused to interfere when there has been gross laches in prosecuting the claim, or long acquiescence in the operation of adverse rights," and recognized the rule that "the party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claims, how he came to be so long ignorant of his rights, and

the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

The rule is laid down in *Stout v. Seabrook*, 30 N. J. Eq. 187, that a decree requiring a copartner to account should be denied in every case where it appears that the party seeking the account has, by his laches, rendered it impossible for the court to do full justice to both parties: *Lawrence v. Rokes*, 61 Me. 38.

In *Sullivan v. Portland etc. R. R. Co.*, 94 U. S. 807, the court by Swayne, J., said: "Every case is governed chiefly by its own circumstances; sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied when there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and decide accordingly": *Bell v. Hudson*, 73 Cal. 285; 2 Am. St. Rep. 791, and note.

It is said by this court in *McDaniels v. Bank of Rutland*, 29 Vt. 230, 70 Am. Dec. 406: "It is true, courts of equity will grant relief for ignorance as well as for a mistake of facts; but the principles on which relief is granted in those cases are very different. When the party has acted in ignorance of facts merely, courts of equity will never afford relief where actual knowledge could have been obtained by the exercise of due diligence and inquiry. That was the very point determined in the case of *Penny v. Martin*, 4 Johns. Ch. 567. Justice Story has also observed (1 Story's Eq. Jur., sec. 146, and note) that 'it is not sufficient that the fact is material; but it must be such that he could not, by reasonable diligence, get knowledge of when he was first put upon inquiry; for if by such reasonable diligence he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence': *Hyde v. Hyde*, 50 Vt. 301; *Durkee v. Durkee*, 59 Vt. 70.

No reason is assigned in the bill why the orators did not call upon Harlow in his lifetime to correct what the master finds are overcharges, nor for their delay in bringing this suit. On account of their acquiescence in the division of

March 1, 1880, their laches, the danger of doing injustice in attempting to adjust the accounts now that Harlow has deceased, we think that what the master finds the several partners then supposed was a final division and settlement should be held conclusive.

All the transactions prior to and including March 1, 1880, were entered by Harlow upon the books, and all the money received by him down to that date was divided among the partners on the basis of those entries. The three hundred dollars which he subsequently received stands differently. The machinery was left with him to dispose of and account for. It is found that when sold, the proceeds were not divided, nor entered upon the books. The defendants must therefore render an account for the three hundred dollars, unless it is barred by the disallowance by the commissioners, and the acceptance and record of their report by the probate court. This being a partnership where there are more than two interests, the probate court did not have jurisdiction: *Kendrick v. Tarbell*, 27 Vt. 512. The act of 1852 (Rev. Laws 1214) conferred only upon county courts the same powers as courts of chancery have in settling such matters. The scope of the bill is to settle the partnership accounts, and ascertain each partner's relation to the firm.

The defendants are also chargeable with interest on the sums of \$50 and \$250 from such times after their receipt by Harlow as he reasonably might have divided them.

Decree reversed and cause remanded, with mandate that the defendants pay to the orators \$240 and interest.

PARTNERSHIP — ACCOUNTING — LACHES. — In an action for partnership accounting, the objection that the claim is stale may be raised by demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action: *Bell v. Hudson*, 73 Cal. 285; 2 Am. St. Rep. 791, and extended note on laches, especially at page 802. Laches, when a defense to a suit in equity. See *Neppach v. Jones*, 20 Or. 491; 23 Am. St. Rep. 145, and note, pp. 148-151. On a bill for an accounting between partners, the statute of limitations will begin to run from the time of the dissolution: *Richardson v. Gregory*, 126 Ill. 166. And seven years will bar a partner's right to relief in equity.

PARTNERSHIP — EFFECT OF DISSOLUTION BY DEATH. — The retention and use of the firm name after the death of one of the partners creates no liability against the estate of the deceased: *Woodward v. Brooks*, 128 Ill. 222; 15 Am. St. Rep. 104, and note. In Pennsylvania, the estate of the deceased partner is liable for the debts of the firm: *Williams's Appeal*, 122 Pa. St. 472.

STEARNS v. EDSON.

[63 VERMONT, 259.]

EXECUTION SALES—CAVEAT EMTOR.—In sales of land under execution, the officer making them is not a party who can be charged as vendor. The rule *caveat emptor* applies, and on failure of title, the purchaser has no relief from the payment of his bid except by resort to equity.

EXECUTION SALES—RETURN—STATUTE OF FRAUDS.—The return of an officer on an execution under which he sells real estate is a sufficient memorandum to satisfy the statute of frauds.

EXECUTION SALES—FAILURE OF TITLE—DELAY IN DELIVERING DEED.—Where the existence of a mortgage against land sold under execution, but not its foreclosure, is disclosed at the time of the sale, the purchaser is not relieved from the payment of the amount of his bid, although between the time of sale and of tendering the deed the equity of redemption has expired; nor will the fact that the officer making the sale delayed longer than the statutory period before tendering the deed relieve such purchaser, unless he has been prejudiced by such delay.

Butler and Moloney, for the appellant.

George E. Lawrence, for the appellee.

TYLER, J. The material facts in this case are as follows: Dunn and Crampton, having a demand against Christ's Church and others, brought a suit upon it for its collection. The writ was served by the plaintiff as deputy sheriff by attaching certain real estate of the debtor situated in the village of Rutland, and was returned to the September term, 1887, of Rutland county court, at which term the plaintiff in that suit recovered a judgment against the defendants therein for \$219.48 debt, and costs. Execution was duly issued and delivered to the plaintiff as deputy sheriff to serve and return, who served the same by levying upon and selling five undivided sevenths of the equity of redemption of the execution debtors in the real estate that had been attached upon the writ, the defendant in this suit bidding off the same for \$250, the amount required to satisfy the execution and the costs of the levy and sale. The execution was dated October 11, 1887, was delivered to the plaintiff November 3d, and the sale thereon was January 21, 1888, having been adjourned from January 14th. The execution, with the officer's return, was recorded in the town clerk's office January 26th, and was returned and recorded in the county clerk's office on the same day. After the attachment by Dunn and Crampton, one Drury brought suit and attached the same land and obtained judgment against the same defendants at the September term, 1887, and execution was issued and delivered to the plaintiff

for service. When Dunn and Crampton's attachment was made, M. and H. O. Edson held a mortgage upon the same land, which they foreclosed at the September term, 1887, of the court of chancery for Rutland County, making Christ's Church and both of the attaching creditors parties to the suit, and obtained a decree against all the defendants in the suit for \$1,145.42, with one year's equity of redemption from October 10, 1887. This defendant did not pay the \$250 which he bid for the land at the sheriff's sale; and neither of the attaching creditors redeemed the premises or paid any part of the decree. May 14, 1888, the defendant purchased Drury's judgment and execution, but did not cause the execution to be levied, and in the following October he purchased the decree of foreclosure and took a quitclaim deed of all the interest in the premises that M. and H. O. Edson acquired by their mortgage and decree. On the occasion of the sale on the execution, the plaintiff made known the existence of the mortgage, and the amount due upon it, but did not state that it had been foreclosed and the time of redemption fixed. Afterwards, and before the equity expired, the defendant learned that the mortgage had been foreclosed, but did not learn that a decree had been made until after the right to redeem had expired. He lived in the village of Rutland, near the county clerk's office, was brother of H. O. Edson, one of the mortgagees, was his partner in business, and in constant business intercourse with him. The referee states that upon inquiry the defendant might easily have ascertained when the right to redeem expired. After the sale, the plaintiff told the defendant that as the execution debtor had six months in which to redeem the land, and the money would not be paid to the creditor until after that time, he, the defendant, could have all the time he required to pay the \$250. Nothing further was said between them until the next November, when the plaintiff demanded of the defendant the amount of the bid-informed him that he had a deed ready to execute, and invited him to go to the plaintiff's office and have it executed and delivered. The defendant replied that he had all the deed he wanted, refused to accept the one offered, or to pay the amount of his bid. The plaintiff has always been ready to execute and deliver the deed upon the defendant's payment of the \$250.

Three grounds of defense are claimed to this action: 1. That the contract, being for the sale of an interest in land, was void

under the statute of frauds, not being in writing; 2. That the omission of the plaintiff to make known the facts at the sale that the mortgage had been foreclosed, a decree made, and the time of redemption fixed, operated as a fraud upon the defendant. It is furthermore insisted that the deed was not seasonably made and tendered to the defendant.

1. It is laid down in Freeman on Executions, sec. 335, that in ordinary circumstances there is no warranty of title, and that the officer has no authority whatever, in his official capacity, to make any warranty or any representations concerning the title. In *The Monte Allegre*, 9 Wheat. 645, where a marshal sold personal property at auction by an order of court, it is held that while acting within the scope of his authority, he could not be considered as warranting the property; that he was merely a minister of the law; and that his whole duty was to give the purchaser a fair opportunity to make examination and inquiry in regard to the nature and condition of the property. This subject is discussed in *Goodbar v. Daniel*, 88 Ala. 583, 16 Am. St. Rep. 76, where it is said that the question whether a purchaser at a sheriff's sale will be relieved from the effect of his bid on its being made to appear that the execution debtor had no title whatever to the thing supposed to be sold, or whether his bid is an irrevocable satisfaction of the judgment to the extent of the sum bid at the sale, is one on which the authorities are about equally divided: Freeman on Judgments, sec. 478; 2 Freeman on Executions, sec. 54. In *Armstrong v. Vroman*, 11 Minn. 220 88 Am. Dec. 81, the court said: "The sheriff may very properly be considered as invested with a trust by law to sell the estate, which he has full power and is bound to perform for the benefit, not only of the creditors of the owner, but likewise for the owner himself."

It seems to be generally held that in sheriff's sales on execution the officer is not a party who can be charged as vendor that he acts as a public officer, as a minister of the law, in obedience to its mandate, and in the execution of the authority which that mandate confers upon him over the property of the debtor; that the state or the law sells the property by its agent, the sheriff; that therefore the rule of *caveat emptor* applies in such sales; that the purchaser bids off the property at his own risk; and that upon any failure of the title he has no relief from the payment of his bid but by a resort to the court of equity: *Tate v. Greenlee*, 4 Dev. 149. See notes and cases

cited in *Lewark v. Carter*, 117 Ind. 206, 10 Am. St. Rep. 40, where the rule of *caveat emptor* as applicable to judicial sales and sales on execution is fully discussed; *Greer v. Winter-smith*, 85 Ky. 516; 7 Am. St. Rep. 613. In some of the states it has been held that this rule does not apply, and that a purchaser at a sheriff's sale on execution is not bound to pay his bid when it turns out that the title is defective. In the decision of this case it is not necessary strictly to follow either line of authorities, for the defendant was apprised by the plaintiff of all the material facts relative to the title, namely, the existence and amount of the mortgage. This knowledge was sufficient to put him on inquiry whether or not the condition of the mortgage had been broken, and whether proceedings had been instituted for the purpose of having the time limited for the redemption of the premises. Having been informed of the mortgage, it would have been natural for the defendant to have ascertained how long it had to run. He seems to have entered upon such an inquiry, for he learned that foreclosure proceedings had been commenced, but did not pursue the matter to the extent of ascertaining whether or not the purpose of the foreclosure had been accomplished by obtaining a decree. The referee does not find that the defendant would have acted differently in any respect had he been informed by the plaintiff at the sale that the time of redemption under the mortgage had been fixed by a decree, or that he suffered loss because that information was not furnished him.

2. The general current of the authorities cited by the plaintiff's counsel is to the effect that a sheriff's sale must be supported by a memorandum, sufficient within the statute of frauds; yet it has often been held that that statute has no application whatever to the sale of real estate by process of law; that a compliance by the sheriff with the requirements of the statute is sufficient. Under our former statute (Rev. Laws 1573), an execution extended and levied upon real estate, with the return of the officer thereon, duly returned and recorded, made a good title to the creditor as against the debtor in such execution; but the authorities that require a memorandum in such sales are uniform in holding that the sheriff's return upon the execution meets the requirements of the statute in that respect.

The execution creditor first created a lien upon the land by attaching it on the original writ, which lien was continued

after judgment by levying the execution upon it. The execution and sheriff's return thereon became a link in the title. The return is a memorandum of the sale by authority of law. It would have been available to the purchaser in obtaining his title, and it should be equally available to the officer in collecting the price for which the property was sold.

3. Section 10, No. 138, Laws of 1884, does not require that the sheriff shall tender, or have ready to tender, a deed of the land until the expiration of six months and fifteen days after the sale. It evidently contemplates that it should be ready for delivery at that time, because it provides that if the premises are not then redeemed by the mortgagor or the subsequent attaching creditors, the officer shall thereupon deliver the deed to the purchaser, while if it is redeemed, he shall destroy the deed and repay the purchaser. If the deed had been offered and accepted, and the \$250 paid at the time fixed by this section, the defendant, in order to protect his interest, must have paid the amount of the Edson decree. When the deed was offered to him on November 7th, he had purchased that decree, so his relation to the property was not changed by the plaintiff's delay in offering him the deed. His liability to pay the \$250 was established when the land was struck off to him at his bid of that sum at the sale, and the plaintiff's neglect for three months to demand the money and offer a deed could not operate to release the defendant from that liability. He apparently undertook to obtain title to the land by buying in the several claims upon it. When called upon to pay his bid, he was naturally content to rest upon the title that he had acquired under the decree, which he purchased after the equity of redemption under it had expired.

Neither ground suggested is sufficient for a reversal of the judgment, and it is affirmed.

EXECUTION SALE—CAVEAT EMPTOR. — A purchaser at a sheriff's sale buys at his own risk: *Goodbar v. Daniel*, 88 Ala. 583; 16 Am. St. Rep. 76, and note; *Lewark v. Carter*, 117 Ind. 206; 10 Am. St. Rep. 40, and note. The rule of *caveat emptor* applies to purchasers at execution sales: *Greer v. Wintersmith*, 85 Ky. 516; 7 Am. St. Rep. 613, and note; *Ray v. Yarnell*, 118 Ind. 112; *Humphrey v. Wade*, 84 Ky. 391.

EXECUTION SALE—STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM. — The certificate of the sheriff is the proper evidence of a sale of real estate on execution, and no other memorandum is required: *Armstrong v. Vroman*, 11 Minn. 220; 88 Am. Dec. 81, and note; *Robinson v. Garth*, 6 Ala. 204; 41 Am. Dec. 47, and note.

BURDITT v. PORTER.

[63 VERMONT, 296.]

PARTIAL ASSIGNMENTS OF DEBT — RIGHT TO REFUSE TO RECOGNIZE, IS PERSONAL. — The right to refuse to recognize partial assignments of a debt by a creditor is personal to the debtor, and cannot be claimed by a third party who sues the creditor and joins the debtor by trustee process.

ASSIGNMENT OF DEBT — NOTICE TO SELECTMAN NOTICE TO TOWN. — Notice of an assignment of a debt against a town need not be given to a majority of its selectmen. Notice to one of them is notice to all, and to the town for which they act.

NOTICE TO AGENT OF CITY AS NOTICE TO CITY. — The rule that notice to the agent of a party, whose duty it is, as such agent, to act upon such notice, or to communicate it to his principal in the proper discharge of his trust as agent, is legal notice to his principal, applies as well to the agents of corporations, both municipal and private, as to those of private persons.

ASSIGNMENT OF DEBT — ACCEPTANCE BY DEBTOR — TRUSTEE PROCESS. — An assigned order upon a town for the payment of its debt need not be accepted by its selectmen to protect the fund from attachment under trustee process.

George E. Lawrance, for the appellant.

Edward Dana, for the appellees.

TYLER, J. The defendant was in the employ of the town of Rutland, trustee, assisting its listers. On the eighth day of April, 1890, for a sufficient consideration, he executed and delivered to the claimant Edson an assignment of all his wages then due and that should thereafter become due while engaged in such service. April 17th the listers gave the defendant an order on the selectmen for twenty-five dollars on account of his work, which, on or about the day of its date, he indorsed over and delivered to the claimant Dana, with the knowledge of Edson, and with his consent that it should take precedence of his order. Dana immediately gave notice to three of the five selectmen of the indorsement to him, and some time after this notice was given, and before the service of the writ in this suit upon the trustee, Edson gave notice to the chairman of the selectmen of his order from the defendant. The writ was served upon the trustee on the second day of May, 1890, at which time the defendant had rendered services to the trustee to the amount of \$52.50, which was more than the amount of the plaintiff's debt and his costs of suit. There was no acceptance by the selectmen of either of these orders, nor a refusal to accept them.

The plaintiff's counsel insists that the Dana order was invalid because it operated to sever the defendant's debt; that the Edson order was void as against the trustee process, because notice of it was not given to a majority of the selectmen; and that both orders were void for the reason that they were not accepted.

1. The defendant could not, without the trustee's consent, have made separate assignments, and thereby subjected the latter to the inconvenience and expense of adjusting different demands against it for the same debt. The controversy, however, is not between the plaintiff and the trustee, but between the plaintiff and the claimants. The trustee holds itself in readiness to pay the money in its hands to whomsoever it belongs. The question of the right of the creditor to sever the debt by assignments does not arise here as it did in *Carter v. Nichols*, 58 Vt. 553. The plaintiff cannot raise the question of severance, for it is solely the right of the debtor to have the entirety of its indebtedness preserved.

2. No question is made but that the notice from claimant Dana to the selectmen was sufficient to protect his order from the trustee process, but it is insisted that the notice from claimant Edson to Selectman Kingsley was insufficient to have that effect.

In *Thayer v. Lyman*, 35 Vt. 646, the plaintiff claimed that the notice was invalid because it was not given to the town treasurer. It was given to two of the three selectmen and was held good, and it was also held that it would have been good had it been given to the treasurer.

While one selectman cannot, without the concurrence of a majority of the board, bind his town by his contract, we see no valid reason for holding that notice of the assignment of a debt against a town must be given to a majority of the selectmen. Notice to one of them is, in legal effect, notice to all, and to the corporation for which they act. The selectmen are by statute made the financial agents of the town, and charged with the general supervision of its affairs. When a notice affecting the town's liability is given to a member of the board, it is given for the town, and it becomes the duty of the member notified to communicate the notice to his associates. It is well settled that notice to an agent of a party, whose duty it is as such agent to act upon the notice, or to communicate his information to his principal in the proper discharge of his trust as such agent, is legal notice to his

principal. This rule applies to the agents of corporations as well as to those of private persons. As a general rule, notice to an agent, in the course of the transaction in which he is acting for his principal, of facts affecting the nature and character of the transaction, is constructive notice to the principal. The principal is deemed to have notice of whatever is communicated to his agent while acting as such in the transaction to which the communication relates: *Porter v. Bank of Rutland*, 19 Vt. 410. A town can receive notice only through its officers or other agents, and it therefore becomes the duty of the agent to communicate the notice received by him to the persons who may be called upon to act with reference thereto: *National Bank v. Norton*, 1 Hill, 572; *Bank of U. S. v. Davis*, 2 Hill, 451; *Fulton Bank v. New York etc. Canal Co.*, 4 Paige, 127; *Suit v. Woodhall*, 113 Mass. 391; *National Security Bank v. Cushman*, 121 Mass. 490.

3. No reason has been or can be assigned why the selectmen should have accepted the orders to give them force and effect. The law does not confer upon the debtor the power to determine whether or not his creditor may sell and assign a debt against him, and at his option defeat an assignment. One may sell a debt as well as a chattel, but to render a sale of a debt valid against creditors, who may seek to attach it by trustee process, notice thereof must be given to the debtor. Our statute (Rev. Laws, 1134) recognizes this right in the creditor, and only gives the trustee, with the other parties to the trustee process when suit is brought, the right to contest the validity of the assignment. On this point, see cases cited on page 717 of Roberts's Digest; *Clafin v. Kimball*, 52 Vt. 6.

The judgment that the trustee be discharged, and that the funds in its hands are the claimants', is affirmed.

ASSIGNMENT OF A DEBT. — An order by a creditor, directing his debtor to pay a third person a sum of money left with the debtor, does not amount to an assignment of any part of the debt, and it may be subjected to trustee process: *Holbrook v. Payne*, 151 Mass. 383; 21 Am. St. Rep. 456, and note; *Harris County v. Campbell*, 68 Tex. 22; 2 Am. St. Rep. 467, and extended note. See *Brem v. Covington*, 104 N. C. 589. Where there is no privity between the parties, there can be no recovery: *Smith v. Board of Commissioners*, 43 Kan. 619.

MUNICIPAL CORPORATIONS — NOTICE TO OFFICERS NOTICE TO CORPORATION. — Individual knowledge of the officers of a municipal corporation is the knowledge of the corporation, if it has reference to matters within their duties: *Dundas v. Lansing*, 75 Mich. 499; 13 Am. St. Rep. 457, and note; *Whipple v. Fair Haven*, 63 Vt. 221.

GOODELL v. BRANDON NATIONAL BANK.

[68 VERMONT, 303.]

ESTOPPEL BY LACHES — OVERCHARGE IN BANK ACCOUNT. — A bank depositor who keeps an open bank account and deposit-book is not estopped to recover an overcharge in his account by the bank from long lapse of time in discovering the mistake, when no disadvantage has resulted to the bank from such delay.

OVERCHARGE IN BANK ACCOUNT — WAIVER OF DEMAND — STATUTE OF LIMITATIONS. — An overcharge by a bank against the account of a depositor who keeps an open account and deposit-book is payable on demand; but such demand will not be waived, nor will the statute of limitations begin to run in favor of the bank, until the discovery of the overcharge by the depositor.

PAYMENT — WAIVER OF DEMAND. — When a debtor holds a specific sum under an honest mistake, his neglect or refusal to pay, to constitute a waiver of demand, must occur after his attention has been called to the mistake, and after he has had reasonable time and opportunity to investigate the circumstances.

C. M. Willard, for the appellant.

J. C. Baker, for the defendant.

ROSS, C. J. For many years the plaintiff kept his account and did his business with the defendant bank. This is an action of *assumpsit*, by which he seeks to recover one thousand dollars and interest, which he claims the defendant overcharged him in his account May 5, 1868. On that day he drew a check on the defendant payable to himself, which, in the left-hand corner, had, in figures, nineteen hundred dollars, but written in the body nine hundred dollars. The defendant charged him in his account nineteen hundred dollars. He claims that this is an overcharge of one thousand dollars, and that he did not discover it until April, 1889, when he demanded payment, and brought this suit. The jury, having failed to agree in regard to the fact whether the defendant did on that occasion overcharge him, the court ordered a verdict for the defendant on the undisputed facts which appeared on the trial before the jury. The defendant undertakes to sustain this action of the trial court on two grounds: —

1. He contends that the plaintiff is estopped from maintaining this suit by his delay and neglect in not discovering the claimed overcharge earlier. It appears that the plaintiff kept a deposit-book, which he frequently had written up by the defendant, on which occasion it returned the checks which he had drawn since the account was last written up, with his deposit-book. In about four weeks after the claimed over-

charge, the plaintiff had the defendant write up his account in his deposit-book. On this occasion he was charged on this check the sum of nineteen hundred dollars, and the check was returned to him. To establish an estoppel *in pais*, it must appear from uncontroverted facts that the defendant has been put to material disadvantage by the neglect and delay of the plaintiff in making the discovery; or that, in reliance upon the fact that the charge truly represented the sum paid, it has taken or neglected to take some action, or lost some right, which would be to its benefit. Nothing of the kind appears from the facts certified in the record. The long delay has doubtless deprived both parties of the personal recollection of those engaged in the transaction. But this is a disadvantage which attaches to both parties. If the defendant, being a moneyed institution, kept its books with care and accuracy, the books ought to have disclosed to it at once whether its cash on hand was one thousand dollars in excess of what its books required. On the basis that there was an overcharge of this amount, the defendant must have been guilty of negligence in not discovering it on the very day it occurred. The record does not disclose that the defendant is put to any disadvantage by the delay of the plaintiff in making discovery of the claimed overcharge. Its books, so far as appears, are in existence, and show its version of the transaction. If the plaintiff's contention is true, the defendant for many years has had this one thousand dollars to use, probably without any charge for interest. We find no ground to justify the action of the trial court on the basis of an estoppel *in pais*.

2. The defendant also contends that the action of the county court should be upheld, because the claim of the plaintiff, if otherwise established on the undisputed facts, was barred by the statute of limitations. It appears that the plaintiff, in April, 1878, drew out the balance standing to his credit upon the books of the defendant, and that he did not keep any deposit or account with the defendant for about two years thereafter. He then opened a new or further account.

The defendant claims that the draft for the balance in 1878 was a demand for what then was due, and that the statute would begin to run from that date.

It is well settled that a deposit of this kind is not payable except upon demand, and that the course of business requires the demand to be made by a written voucher or check. But checks are only demands for the amounts named in them.

Hence the check drawn for the balance shown by the defendant's books in 1878 was not a demand for the one thousand dollars now claimed by the plaintiff. The defendant further contends that passing back the plaintiff's deposit-book on this occasion, and on all other occasions, after the now claimed one thousand dollars was charged thereon, was legally a denial by the defendant that it had that one thousand dollars subject to the check of the plaintiff, and a refusal to pay it if demanded; and thereupon the plaintiff had a right of action for its recovery without demand. Ordinarily, a denial of the debt, subject to payment only on demand, is a waiver of the right of demand, and the creditor may sue at once without making demand. To have this effect, the denial must relate to the identical sum sued for. Where the debtor holds such sum under an honest mistake, his neglect or refusal of payment, to amount to a waiver of a formal demand, must occur after his attention has been called to the circumstances of the claimed mistake, and after he has had a reasonable time and opportunity to investigate the circumstances. On none of the occasions in which the plaintiff's deposit-book was written up by the defendant and returned to the plaintiff subsequently to the claimed overcharge was the attention of either party called to the fact of the overcharge. Hence no waiver of demand on the part of the defendant arose.

On the facts disclosed, the plaintiff had never drawn a check for the claimed one thousand dollars, nor demanded it, until 1889, and no right of action arose in favor of the plaintiff for its recovery until then.

On these views, neither of the contentions of defendant sustains the action of the county court in ordering the verdict.

Judgment reversed and cause remanded.

BANKS AND BANKING — OVERCHARGE — ESTOPPEL BY LACHES. — Mere lapse of time does not act as an estoppel for any period less than that prescribed by the statute of limitations: *Grafton Bank v. Doe*, 19 Vt. 463; 47 Am. Dec. 697. It is the duty of a depositor to know whether his account with the bank is correct, and promptly to report any error in the same: *Weinstein v. National Bank*, 69 Tex. 38; 5 Am. St. Rep. 23, and note.

BANKS AND BANKING — DEPOSIT — STATUTE OF LIMITATIONS. — The statute of limitations does not begin to run against a deposit in a bank until demand is made and payment refused: *Girard Bank v. Bank*, 39 Pa. St. 92; 80 Am. Dec. 507, and note; *Dickinson v. Leominster etc. Bank*, 152 Mass. 49.

BURTON v. KENNEDY.

[63 VERMONT, 350.]

CO-TENANCY — ENTIRE CHATTEL SUBJECT TO LEVY UNDER EXECUTION AGAINST ONE CO-TENANT. — Replevin will not lie against an officer who has levied upon, taken possession of, and advertised for sale an entire chattel, the legal title to which is in co-tenants, under an execution against one of them. The rights of the other co-tenant are not affected in such case until the sale of the entire chattel.

EXECUTION, DAMAGES FOR DELAY IN SERVING. — Where the service of an execution has been delayed by a suit in replevin, the defendant in replevin is entitled, as damages for the delay, to statutory interest on the value of the goods owned by the execution defendant.

CO-TENANTS, PRESUMPTION AS TO INTERESTS OF. — If property is shown to belong to two or more persons as co-tenants, their respective interests will be presumed to be equal.

Wilson and Hall, for the appellant.

Farrington and Post, for the appellee.

TAFT, J. The plaintiff testified that he and E. A. Sowles owned the property in question, and upon the trial the interest of the parties in the property was treated by the parties and the court as joint or in common. The legal title of the property being in Burton and Sowles, the property was seized and taken upon execution as the property of Sowles, by one of his creditors, the defendant acting as sheriff, and advertised for sale. Before the advertised time of sale, this suit was brought and the goods replevied. In taking personal property upon an execution, an officer may seize and retain an entire chattel owned by the defendant in common with another. In case the officer takes actual possession of the property seized, there is no other mode in which the officer can make the levy than by taking the entire chattel: *Reed v. Shepardson*, 2 Vt. 120; 19 Am. Dec. 697; *Whitney v. Ladd*, 10 Vt. 165. The defendant had the right to seize and hold the property on the attachment against Sowles. He had a right to its possession superior to that of the plaintiff. As is stated in *Whitney v. Ladd*, 10 Vt. 165: "It is impossible to hold that the interest of one joint owner of personal property can be taken and sold on his individual debt, consistently with our laws, without holding that the possession by the officer is paramount to all others. In opposition to the application of this rule to the case at bar, the plaintiff makes two questions: —

1. That the levy was void, for that it was upon the whole

property, instead of the interest of Sowles. In respect of the acts of the defendant in seizing and holding the property, nothing was done by the defendant but that he had the legal right to do to make the levy effective upon Sowles's interest. No right of possession to which the plaintiff was entitled was disturbed. The attachment, or levy, and the after sale, is what has been held in our Vermont cases to constitute an invasion of the rights of a co-tenant, in case the entire property is seized and sold upon process against the other joint owner. Such are the cases cited by plaintiff's counsel of *Ladd v. Hill*, 4 Vt. 164; *Bradley v. Arnold*, 16 Vt. 382. When an officer seizes chattels upon valid and void process at the same time, so long as he holds it rightly upon the valid process he is not liable to the owner because he returned that he attached it upon the void precept: *Luce v. Hoisington*, 54 Vt. 428. In *Spaulding v. Orcutt*, 56 Vt. 218, one co-tenant having possession of the common property, and having a debt against her co-tenant, her co-tenant attached the property, but did not in any way change the possession. In an action by mortgagees of the co-tenant's interest, against the officer who made the attachment, it was held that the attachment constituted no conversion. When an officer takes a chattel upon an attachment against one joint owner, he is entitled to the possession of it as against the co-owner. When he sells the entire chattel, the co-tenant's rights are invaded. This objection is not tenable.

2. The plaintiff contends that if the levy was properly made, that Sowles had no interest in the property, i. e., no surplus left after an adjustment of the respective rights of Burton and Sowles in the property, and therefore Sowles had no interest in the property which could be sold. It is the legal title, not the equitable interest, that controls in this action at law.

We hold that if Sowles had the legal title to an undivided part of the chattels, which fact was undisputed upon the trial, that part could be taken by one of his creditors by way of attachment, even if his interest in the chattels was but nominal. It was so held in respect of a partner's interest in an insolvent partnership in *Reed v. Shepardson*, 2 Vt. 120, 19 Am. Dec. 697, and we see no reason why the rule should be different in case of a joint or common ownership of property. An officer can take upon execution and sell the legal interest of a tenant in common, or joint owner, although it is but nomi-

nal. The motion to direct a verdict for the defendant should have been granted. The assessment of damages is referred to the clerk, under section 1178 of the Revised Laws. If he finds that the service of the execution has been delayed by reason of the replevin, the defendant is entitled to damages at the rate of twelve per cent annually on the value of the goods for the time of such delay: Rev. Laws, sec. 1234.

In what proportion the property is owned by Burton and Sowles is not shown by the exceptions. In the absence of such showing, the presumption is, that they own it equally. If the delay is found by the clerk, the twelve per cent should be cast upon one half the value of the entire property, i. e., the value of Sowles's proportion. If such delay is not found, the clerk will enter nominal damages.

Judgment reversed, and judgment for the defendant for a return of the property replevied, with damages and costs.

CO-TENANCY — EXECUTION — SALE OF ENTIRE PROPERTY TO SATISFY EXECUTION AGAINST ONE CO-TENANT. — A sheriff, under *feri facias* against one co-tenant, levying on and selling their joint property, is liable to an action by the other co-tenant: *Rains v. McNairy*, 4 Humph. 356; 40 Am. Dec. 651. But a tenant in common cannot maintain replevin against an officer attaching the goods for a debt of the other co-tenants: *Kimball v. Thompson*, 4 Cush. 441; 50 Am. Dec. 779, and note. See extended note to *McCoy v. Brennan*, 1 Am. St. Rep. 593, where cases discussing this subject are collected. A judgment is a lien upon the judgment debtors' undivided interest as tenants in common, but this lien is subordinate to the rights of the co-tenants to enforce partition: *Ketchin v. Patrick*, 32 S. C. 443.

CO-TENANCY — INTERESTS OF CO-TENANTS, HOW DETERMINED. — The interests of joint owners of land, in the absence of some other controlling fact, is to be determined by the proportion which the amount of the purchase-money paid by each bears to the entire consideration: *Huffman v. Mulkey*, 78 Tex. 556; 22 Am. St. Rep. 71.

WHEELER v. SELDEN.

[63 VERMONT, 429.]

SALES FROM HUSBAND TO WIFE — CHANGE OF POSSESSION. — To render a sale of personal property by a husband to his wife valid against the vendor's creditors, there must be an apparent and exclusive change of possession from the vendor to the vendee. A statute designed to enable married women to make contracts the same as if sole, and to protect their personal estate from their husband's creditors, does not affect this rule.

L. F. Wilbur and D. J. Foster, for the appellant.

W. L. Burnap and J. J. Enright, for the appellee.

TYLER, J. The case shows that Arnold and his wife resided in Burlington upon premises owned by the latter; that Arnold was the lessee of a barn situated in another part of the city, in which were kept a sleigh, owned by the wife, and the wagon in controversy, owned by Arnold; that while the property was thus situated, they made an exchange by which the sleigh became Arnold's, and the wagon the wife's, the wagon, when not in use, remaining in the barn as before. Previous to the exchange, Arnold had been accustomed to use the wagon in going to and returning from his farm in South Burlington, and for other purposes. Mrs. Arnold also frequently used it after the exchange, as she had done prior thereto. On an occasion when Arnold had the wagon at his farm, it was attached by the plaintiff as a deputy sheriff, on a writ in favor of a creditor of Arnold, and while in the officer's possession by virtue of the attachment, it was taken away by the defendant while acting as Mrs. Arnold's agent and upon claim of her title to the property. Judgment was obtained by the creditor against Arnold in the suit upon which the attachment was made, and an execution was issued and returned by the plaintiff unsatisfied.

It is conceded that the wife acquired a good title to the wagon as against her husband. As we construe the exceptions, the question raised is in relation to her ownership of it as against her husband's creditors. The plaintiff's counsel refer to *Leavitt v. Jones*, 54 Vt. 423, 41 Am. Rep. 849, but in that case it was only held that a wife purchasing personal property with her own money from her husband can hold it as her separate property, and that her title is only liable to be defeated by her husband's creditors, if all the requirements of the law necessary to render the sale and transfer valid as against such creditors are not complied with.

The rule in this state is well understood by the profession, that to render a sale of personal property valid against the vendor's creditors, there must be a change of possession of the property from the vendor to the vendee; that the vendee's possession must be exclusive and apparent: *Weeks v. Prescott*, 53 Vt. 57. Where there is a joint possession by the vendor and the vendee, the property is liable to attachment upon the vendor's debts if a candid observer would be at a loss to determine which of the two has the chief control and possession of it, and in case of doubt, the law resolves the doubt against the party who should make the change of possession open and

visible: *Flanagan v. Wood*, 33 Vt. 332. The reason of the rule, which is to prevent fraudulent transfers of property, applies more strongly to transactions between husbands and wives than to those between other persons, because of the greater facility for the commission of frauds of this character between the former.

No. 140, Acts of 1884, is cited by the plaintiff's counsel as affording ground for the claim that there was a sufficient change of possession of this property. That act was designed to enable married women to make contracts the same as if sole, and to protect their personal estate from their husbands' creditors. It is true, however, that prior to the passage of this act a husband could make a valid sale of personal property to his wife, and that a married woman could acquire as perfect a title to such property from her husband as she could from a stranger: *Leavitt v. Jones*, 54 Vt. 423; 41 Am. Rep. 849. The act referred to does not prescribe what shall be a sufficient change of possession of property in case of such sale, and it in no wise relaxes or varies the rule above stated.

Judgment affirmed.

SALES—CHANGE OF POSSESSION—NECESSITY FOR, AS AGAINST CREDITORS.—The retention of possession by the seller in a sale of chattels renders the transaction void as to his creditors: *Stephens v. Gifford*, 137 Pa. St. 219; 21 Am. St. Rep. 868, and note; *Clafin v. Rosenberg*, 42 Mo. 439; 97 Am. Dec. 336, and extended note; *Sturtevant v. Ballard*, 9 Johns. 337; 6 Am. Dec. 281, and extended note; *Knoop v. Nelson etc. Co.*, 102 Mo. 156; *Lathrop v. Clayton*, 45 Minn. 124; *Bunting v. Saltz*, 84 Cal. 168; *Huschle v. Morris*, 131 Ill. 587. A farmer sold his farm, selling a team to his wife, who rented the farm. He engaged in other business. There was a sufficient delivery of the team as against the husband's creditors: *Pearson v. Quist*, 79 Iowa, 54.

DURAN v. STANDARD LIFE AND ACCIDENT INS. CO.

[63 VERMONT, 437.]

INSURANCE—CONSTRUCTION OF POLICY.—A contract of insurance is to be construed as a whole, so as to receive a reasonable interpretation, and the risk is not to be extended beyond what is fairly within the terms of the policy. All conditions involving forfeitures or exemptions are, however, to be construed strictly against the insurer, and most favorably for the insured.

ACCIDENT INSURANCE—VIOLATION OF SUNDAY LAW AS BAR TO RECOVERY.—Under an accident insurance policy providing that no recovery can be had for an injury effected or resulting wholly or partly, directly or indirectly, from any violation of law, the insured cannot recover for an

injury received on Sunday, and caused by an accident while he was returning from a hunting expedition, in a state where the statute prohibits both hunting and traveling for pleasure on Sunday.

Seneca Haselton and L. F. Englesby, for the appellant.

W. L. Burnap and J. J. Enright, for the appellee.

THOMPSON, J. This is an action of *assumpsit* on two policies issued by defendant to plaintiff, insuring him against accidental injuries. If the plaintiff has any ground of recovery, it rests wholly on these contracts of indemnity. A contract of insurance is to be construed according to its terms and the evident intent of the parties as gathered from the language used. All conditions involving forfeitures, as well as all exemptions, are to be construed strictly against the insurer, and most favorably for the insured. Yet the language of the contract is to be construed as a whole, is to receive a reasonable interpretation, and the risk is not to be extended beyond what is fairly within the terms of the policy: May on Insurance, 2d ed., secs. 172, 175; *Brink v. Merchants' etc. Ins. Co.*, 49 Vt. 442; *Mosley v. Vermont etc. Ins. Co.*, 55 Vt. 142; *Darrow v. Family Fund Soc.*, 116 N. Y. 537; 15 Am. St. Rep. 430; *Mutual Assur. Soc. v. Scottish Union etc. Ins. Co.*, 84 Va. 116; 10 Am. St. Rep. 819.

Each policy contains the following clause: "This insurance does not cover . . . injury resulting wholly or partly, directly or indirectly, from any of the following acts, causes, or conditions, or when effected by any such act, cause, or condition, or under its influence." Then follows an enumeration of such acts, causes, or conditions, among which is "violation of law" by the insured.

The injury for which plaintiff seeks to recover is an injury to his knee sustained by him on Sunday, January 20, 1889. The plaintiff and a companion, about nine o'clock in the forenoon of that day, took guns and ammunition and set out from Burlington on foot for Colechester on a hunting expedition. They traveled on the highway six or seven miles, and then took dinner with a Mr. Coates. After dinner they engaged in hunting with Coates, who went with them as far as a Mr. Thayer's, where they stopped a short time. Here Coates left them, and the plaintiff and his companion started for home through a field, and while crossing frozen plowed ground in the field to get to the highway the plaintiff's foot slipped upon the frozen plowed ground, and his knee was

injured. At the time of slipping he was carrying his gun. The accident occurred between two and three o'clock in the afternoon.

The defendant contends that the facts of the case bring it within the provisions of the policy in respect to violations of law, and that therefore the plaintiff cannot recover.

Section 4315 of the Revised Laws prohibits traveling on Sunday except from necessity or charity, or visiting from house to house except from motives of humanity or charity, or for moral or religious edification. Section 4316 of the Revised Laws prohibits hunting, shooting, pursuing, taking, or killing wild game or other birds or animals on Sunday. A person violating the provisions of either of these sections is to be fined.

At the time of the accident, the plaintiff was engaged in hunting. He had his gun with him, and was ready to shoot any game he might see, whether in the field or along the highway on his way home. He started out to secure game wherever he might find it, and it does not appear that at the time of the accident he had abandoned this purpose. In hunting he was violating the law of this state. The traveling of the plaintiff was as much a part of his act of hunting as carrying his gun and ammunition or shooting or capturing game when the opportunity occurred in the course of the hunt. Without walking, the plaintiff could not have engaged in his hunt. Thus the accident was caused directly by plaintiff's violation of the law in hunting.

The effect of the violation of the Sunday law upon a person's right to recover for injuries received in the course of such violation has generally arisen in cases in which the defendant sought to escape responsibility for his own tort to a traveler or laborer. On this question the decisions have not been uniform. Some courts have held that the immediate cause of the injury was the travel or labor on Sunday, and that the plaintiff could not recover. Of this class of cases are *Day v. Highland Street R'y Co.*, 135 Mass. 113; 46 Am. Rep. 447; *Cratty v. City of Bangor*, 57 Me. 423; 2 Am. Rep. 56. Other able courts have held that a Sunday traveler or laborer injured by the wrongful act or neglect of another might recover upon the ground that the violation of the Sunday law by the injured party is in the nature of a condition rather than an immediate cause of the injury. To this effect are *Baldwin v. Barney*, 12 R. I. 392; 34 Am. Rep. 670; *Platz v. City of Cohoes*,

89 N. Y. 219; 42 Am. Rep. 286; *Sutton v. Town of Wauwatosa*, 29 Wis. 21; 9 Am. Rep. 534. In *Johnson v. Irasburgh*, 47 Vt. 28, 19 Am. Rep. 111, the court avoided the line of reasoning adopted in each of these class of cases by holding that a town was not bound to maintain a safe and sufficient highway for unlawful travel on Sunday or any other day, and that a person using the highway in violation of the Sunday law was there at his own risk, there being no duty or liability on the part of the town in respect to the highway except that imposed by statute. The plaintiff's right of recovery rests in contract, and not in tort. No act or neglect of the defendant caused or contributed to the plaintiff's injury. Were the reasoning in *Baldwin v. Barney*, 12 R. I. 392, 34 Am. Rep. 670, to be adopted, it would not avail the plaintiff, for if being engaged in the unlawful expedition was not the immediate cause of his injury, it was certainly the condition causing it. The provision quoted from the policy excluded liability from any injury of which a violation of law was the cause or the condition producing it. It also expressly provides exemption from liability where violation of law is either the proximate or remote cause or condition producing the injury. In short, it is so drawn as to exempt from liability under the reasoning and the holding of the courts in both class of cases cited.

The plaintiff contends in argument that he was not engaged in hunting at the time he received the injury, but was walking home after he had been visiting. Were this claim conceded, we do not see how it gives plaintiff any better ground for recovery. He was not out simply for open-air and gentle exercise, without any object of business or pleasure, as in *Hamilton v. City of Boston*, 14 Allen, 475, but was traveling several miles, and from town to town, on this theory, to make a visit for pleasure. In *Cratty v. City of Bangor*, 57 Me. 423, 2 Am. Rep. 56, the plaintiff was traveling on foot, on Sunday, with other persons, to make a visit of pleasure to a friend, and it was held that he was traveling in violation of a statute prohibiting traveling on Sunday, unless for charity or necessity. The court further says, that "no distinction is made between those who travel within town and those who travel from town to town." In going from Burlington to Colchester and back, a distance of twelve or fourteen miles, to visit Coates for pleasure, or to hunt, the plaintiff was clearly violating the provisions of section 4315 of the Revised Laws, prohibiting traveling

on Sunday. Every step he took in making that trip was in and of itself a violation of law. In taking one of those steps, he slipped and was injured. We think it would savor too strongly of hair-splitting refinement to hold that the injury was not directly caused by the violation of law in traveling. But in this view of the case, the exception in the policy exempts the defendant from liability, whether the traveling is held to be the cause or only a condition producing injury, or influencing it, directly or indirectly. The liability to accident must be greatly enhanced in the case of a person who, like the plaintiff, engages in hunting or traveling about the country on Sunday, in open violation of law, as compared with one who observes the law. The defendant had a right to say that it would not assume such increased risk.

The defendant not having contracted to indemnify the plaintiff for the injury which he received, he cannot recover.

Judgment reversed, and judgment for defendant.

INSURANCE — CONTRACT OF — CONSTRUCTION OF. — The contract of insurance, like any other contract, is to be construed as a whole, and with reference to the intention of the parties: *Rankin v. Amazon Ins. Co.*, 89 Cal. 203; 23 Am. St. Rep. 460, and note; *Renshaw v. Missouri etc. Ins. Co.*, 103 Mo. 595; 23 Am. St. Rep. 904.

INSURANCE — FORFEITURES. — The construction of a policy of insurance must always be in favor of upholding the contract, and forfeitures will always be most strongly construed against the insurer: *Darrow v. Family Fund Society*, 116 N. Y. 537; 15 Am. St. Rep. 430; *True v. Bankers' Life Ass'n*, 78 Wis. 287.

SUNDAY LAW — RECOVERY FOR ACCIDENT WHILE TRAVELING IN VIOLATION OF. — One who is traveling in violation of a Sunday law may recover for an injury received through the negligence of another: *Platz v. Cohoes*, 89 N. Y. 219; 42 Am. Rep. 286. See note to *Coleman v. Henderson*, 12 Am. Dec. 294.

BUZZELL v. STILL.

[63 VERMONT, 490.]

MORTGAGES — FORECLOSURE OF JUNIOR MORTGAGE AS RES JUDICATA. — One holding a senior mortgage, the superiority of which is not drawn in question by a bill to foreclose a junior mortgage, is not divested of his prior right by the ordinary decree of foreclosure against him therein, nor will his superior right be placed in issue by making him a party to such bill and alleging therein that he claims title to the premises by deed or otherwise.

MORTGAGES — MERGER. — Where first, second, and third mortgages exist against the same property, and the third mortgage is by deed absolute on its face, an assignment of the first mortgage to the third mortgagee will not merge the first and third mortgages.

PETITION to foreclose a mortgage executed by B. W. Still and wife to one S. F. Frary on March 17, 1877, and assigned to the petitioner, J. W. Buzzell, November 2, 1878. On October 30, 1878, said Still and wife gave Buzzell a warranty deed, absolute in form, but a mortgage in fact, on the same premises, to secure their other indebtedness to him, not included in the said Frary mortgage. Still and wife also executed a mortgage on the same premises to one Mary A. Still on April 17, 1877. This mortgage was foreclosed some time during the year 1880, and as no redemption followed, Mary A. Still conveyed the same premises to defendant Eugene L. Still by warranty deed, July 19, 1882, and he conveyed the same premises by mortgage deed to defendant L. D. Parker, on the same day. The remaining facts appear in the opinion. Judgment dismissing the petition, and plaintiff appealed.

John H. Watson, for the appellant.

J. K. Darling, for the appellees.

ROWELL, J. The mortgage of April 17, 1877, from Benjamin W. Still and wife to Mary A. Still, warranted the premises free from every encumbrance except the Frary mortgage, of which the petitioner is assignee, and which he is now seeking to foreclose. Thus Mary A. Still had actual notice of the Frary mortgage when she took her mortgage. She also had constructive notice of it, as it was on record. Hence she took her mortgage subject to it.

The petitioner was made a party defendant in the suit to foreclose her mortgage. The only allegation in the petition in that case in respect of this petitioner's interest in the premises was, that he claimed title thereto "by deed or otherwise." He then owned the Frary mortgage, and held his deed of October 30, 1878, which had been duly recorded, and which, though absolute in form, was a mortgage in fact, and inferior to Mrs. Still's mortgage. The petitioner made no answer in that case, and the petition was taken as confessed, and the ordinary decree of foreclosure passed against all the defendants, and none of them redeemed, so the decree became absolute. It is now claimed that that decree bars the Frary mortgage, and that therefore the petitioner cannot have a decree of foreclosure upon it. But this is clearly not so. One holding a senior mortgage, the superiority of which is not drawn in question by the bill brought to foreclose a junior mortgage, is not divested of his prior right by the ordinary

decree of foreclosure therein against him, for such right is not in issue. The clause in such decrees, that the defendant and all persons claiming under him "shall be foreclosed and forever barred from all equity of redemption in the premises," relates only to such rights and interests as are inferior to the mortgage that is foreclosed, and not to such as are superior: *Emigrant etc. Sav. Bank v. Goldman*, 75 N. Y. 127; *Lewis v. Smith*, 9 N. Y. 502; 61 Am. Dec. 706; *Strobe v. Downer*, 13 Wis. 10; 80 Am. Dec. 709, and note; *Shaw v. Chamberlin*, 45 Vt. 512; *Bowne v. Page*, 2 Tyler, 392.

The effect of the decree foreclosing the Mary A. Still mortgage was to cut off the equity of redemption as to the defendant's inferior rights in the premises, and thereby to convert the conditional title conveyed by that mortgage into an absolute title; but in all other respects the rights under that mortgage thus made absolute were left to be determined by the deed itself. It then stood just as it would have stood had the mortgage been an absolute deed in the first place: *St. Johnsbury etc. R. R. Co. v. Willard*, 61 Vt. 134; 15 Am. St. Rep. 886; and had it been an absolute deed in the first place, it would have conveyed nothing as against the Frary mortgage but the equity of redemption, for that was all the mortgagors had to convey.

The defendants claim a merger, and that the defendant Eugene Still is a *bona fide* purchaser without notice. But there is nothing in the petition to show a merger, as is abundantly shown by the law of merger as laid down in *Carpenter v. Gleason*, 58 Vt. 244.

Neither is there anything alleged on which said Still can stand as a *bona fide* purchaser without notice.

Decree reversed, demurrer overruled, petition adjudged sufficient, and cause remanded.

MORTGAGES — DECREE OF FORECLOSURE — RES JUDICATA. — As to the effect of a foreclosure as to the first mortgagee, where the mortgage foreclosed is subsequent to his mortgage, see note to *Strobe v. Downer*, 13 Wis. 10; 80 Am. Dec. 709, and note 714-717. A decree of foreclosure which does not adjudicate upon the character of the property which is ordered sold to satisfy the mortgage does estop a prior lien-holder from treating the property as personalty: *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381; 21 Am. St. Rep. 231.

MERGER OF ESTATES, WHEN TAKES PLACE: See *Boykin v. Ancrum*, 28 S. C. 486; 13 Am. St. Rep. 698; note to *Speed v. Haun*, 15 Am. Dec. 82, 83. If there is an intervening mortgage, attachment, or other lien, the acquirement of the title by a prior mortgagee will not operate as a merger: *Scrivner v. Dietz*, 84 Cal. 295.

TOWN OF CORINTH v. EMERY.

[68 VERMONT, 505.]

ENTIRETIES, LAND HELD BY, NOT SUBJECT TO HUSBAND'S DEBTS. — Where real estate is conveyed to husband and wife jointly, they take as one person, and the husband has no interest, either in the fee or in the usufruct, subject to execution in payment of his sole debts.

Smith and Sloane, for the appellants.

J. K. Darling and R. M. Harvey, for the appellee.

TAFT, J. The plaintiff claims an interest in the demanded premises by virtue of a levy of and sale upon an execution in its favor against the defendant. The defendant's interest in the premises at the time of the levy and sale arose under a deed conveying the premises to himself and wife. It is conceded that the estate created by the deed was one by entirety. This estate, created by conveyance to husband and wife, is a peculiar one. The interest of the grantees is not joint, nor in common. The parties do not hold moieties, but take as one person, taking as a corporation would take; they have but one title; each is seised of the whole, and each owns the whole. If one dies, the estate continues in the survivor, the same as if one of several corporators dies. It does not descend upon the death of either, but the longest liver, being already seised of the entire estate, is the owner of it. One tenant by entirety cannot sever the tenancy by deed, as a joint tenant can, for neither can alien so as to bind the other. Our statute of partition (Rev. Laws, sec. 1275), does not extend to this estate; and a conveyance to husband and wife is expressly excepted from the operation of the statute (Rev. Laws, sec. 1917) abolishing joint tenancies. If the husband be attainted, his attainder does not affect the right of the wife, if she survive him. Divorce *vinculo* does not destroy the estate, and the *jus accrescendi* takes affect upon the death of the one first dying. As an illustration of the rule that there are no moieties between husband and wife, and that they take as one person, it may be stated that when land is conveyed to husband and wife and a third person, the husband and wife take but a moiety, the third person taking a like moiety. The following citations may be referred to for authorities touching the characteristics of this estate: Co. Lit. 187; Bac. Abr., tit. Joint Tenancy, B; 2 Cruise on Real Property, sec. 35; 2 Bla. Com. 182; 4 Kent's Com. 362; *Nichols v. Nichols*, 2 Plow. 483; Skin.

182; *Doe v. Parratt*, 5 Term Rep. 652; *Doe v. Wilson*, 4 Barn. & Ald. 303; *Dias v. Glover*, Hoff. Ch. 71; *Rogers v. Benson*, 5 Johns. Ch. 431; *Den v. Hardenbergh*, 10 N. J. L. 42; 18 Am. Dec. 371, and note; *Taul v. Campbell*, 7 Yerg. 319; 27 Am. Dec. 508; *Fairchild v. Chastelleux*, 1 Pa. St. 179; 44 Am. Dec. 117; *Stuckey v. Keefe's Ex'rs*, 26 Pa. St. 397; *McCurdy v. Canning*, 64 Pa. St. 39; *Wright v. Saddler*, 20 N. Y. 320; *Lewis's Appeal*, 85 Mich. 340; 24 Am. St. Rep. 94; *Chandler v. Cheney*, 37 Ind. 391.

The doctrine of survivorship in case of tenancies by entirety has been repudiated in Ohio and Connecticut: *Sergeant v. Steinberger*, 2 Ohio, 305; 15 Am. Dec. 553; *Phelps v. Jepson*, 1 Root, 48; 1 Am. Dec. 33; *Whittlesey v. Fuller*, 11 Conn. 337. The Connecticut court admits that it is the doctrine of the English law, and seems to base its decisions upon local customs and usage. The rule has been altered, in some respects, by legislation in the states of Iowa and Illinois.

The rule is recognized in Vermont, in *Brownson v. Hull*, 16 Vt. 309; 42 Am. Dec. 517; is stated by Barrett, J., to be settled law, in *Davis v. Davis*, 30 Vt. 440; and cited approvingly in *Park v. Pratt*, 38 Vt. 545. The plaintiff insists that the defendant was entitled to the use, income, and profits of the estate during his life, that he had a life estate in the property, and that it was subject to levy and sale upon an execution against him alone. Such undoubtedly is the common law. The husband, during his life, is entitled to the usufruct of the real estate belonging to his wife, and no doubt by that law can convey such life estate, or encumber it, and it may be taken upon execution against him alone. This rule was in force in this state in 1844, when *Brownson v. Hull*, 16 Vt. 309, 42 Am. Dec. 517, was decided, and Royce, J., stated that he supposed the estate was liable to attachment and execution at all times during the joint lives of the owners; and by this we understand he meant that the life estate of the husband could be taken upon his sole debts, but not so as to affect the right of the wife, should she survive him. But the legislature soon enacted that the rents, issues, and profits of the real estate of any married woman, and the interest of her husband in her right in any real estate which belonged to her before marriage, or which she may have acquired by gift, grant, devise, or inheritance during coverture, shall, during coverture, be exempt from attachment or levy of execution for the sole debts of her husband: Acts 1847, No. 37, sec. 1. By a sub-

sequent act, it was provided that the words "issues and profits" shall be construed to include all moneys and obligations arising from the sale of such real estate: Acts 1850, No. 22; and later, the products of such real estate are in like manner protected: Acts 1861, No. 25. These provisions are embodied in our present statutes: Rev. Laws, secs. 2324, 2325. The plaintiff's counsel insist that these sections do not apply to an estate by entirety, but only to such real estate as may be owned by the wife separately. In this we think they are in error. Such an estate is the real estate of a married woman although her husband is joined with her in the title. It is the real estate of each. If the claim of the plaintiff is upheld, then the interest of the husband in his wife's right in her real estate is taken upon the sole debt of the husband. This would annul the statute. The estate of the wife, and her husband's interest therein in her right, in the property in question is protected from the husband's sole creditors by the spirit and letter of the statute. This construction has been given a similar statute in Indiana: *Davis v. Clark*, 26 Ind. 424; 89 Am. Dec. 471.

If the conveyance of the premises in question to the defendant and wife was a fraud upon the defendant's creditors, the latter must seek their remedy in some other action, and probably in the same manner they would be obliged to adopt in case the property had been conveyed to the defendant's wife, instead of the defendant and his wife jointly.

Judgment reversed, and judgment for the defendant.

HUSBAND AND WIFE — ENTIRETIES. — Where land is devised or conveyed to a husband and wife jointly, they take by entirety: *Harrison v. Ray*, 108 N. C. 215; 23 Am. St. Rep. 57, and note; and neither can convey any interest without the consent of the other during the existence of the marriage relation: *Enyeart v. Kepler*, 118 Ind. 34; 10 Am. St. Rep. 94, and note, where the cases on this subject are collected; *Simonton v. Cornelius*, 98 N. C. 433; *Baker v. Stewart*, 40 Kan. 442; and this was the rule in New Hampshire previous to the abolishing act.

LYNDON MILL COMPANY v. LYNDON LITERARY AND BIBLICAL INSTITUTION.

[63 VERMONT, 581.]

CORPORATIONS — POWER OF PRESIDENT TO BIND CORPORATION. — The president of the board of trustees of a corporation, in the absence of express or implied power, has no more authority to bind the corporation than any other individual trustee.

CORPORATIONS — POWER OF PRESIDENT — PRESUMPTION. — It will not be presumed, that by virtue of his office as president of the trustees of a corporation, such president has power to bind the corporation.

SALES. — IMPLIED PROMISE TO PAY FOR GOODS transferred from one person to another will not arise from the mere fact of their being received and used, when it was understood by the parties at the time that the goods were not to be paid for.

CORPORATIONS — IMPLIED PROMISE TO PAY FOR GOODS RECEIVED. — Where the president of the board of trustees of a corporation without authority to bind it orders goods for its use, under an agreement with his co-trustees that he is to furnish such goods gratuitously, the fact that the corporation receives and uses them will not raise an implied promise to pay, or make it liable for their price; nor will the fact that such president is an officer in the corporation furnishing the goods, with knowledge that such goods are charged to the other corporation, make it liable for their price. The knowledge of such trustee, in such case, is not imputable to the corporation sought to be charged.

CORPORATION — NOTICE TO AGENT AS NOTICE TO CORPORATION. — Where two corporations have dealings through the intervention of a mutual agent, the question of whether or not either corporation is to be charged with notice of what is known to such agent by virtue of his relation to the other depends upon the circumstances of the case.

CORPORATION — RATIFICATION OF UNAUTHORIZED CONTRACT. — Officers of a corporation without authority to bind the corporation by their acts have no power to ratify an unauthorized contract by their failure to repudiate a claim arising out of such contract, when presented against the corporation.

CORPORATIONS. — ESTOPPEL AGAINST CORPORATION TO DENY ITS LIABILITY, by reason of its failure to disaffirm an unauthorized contract made with it, does not arise until it has knowledge that such contract has been made, or the party claiming the estoppel has been damaged by its authorized act.

CORPORATIONS — EVIDENCE OF UNAUTHORIZED CONTRACT. — In an action against a corporation to recover for goods claimed by it to have been furnished under an unauthorized contract, evidence of an agreement between the president of the board of trustees of such corporation and his co-trustees, that he was to furnish the goods gratuitously, is admissible to show his want of authority to bind the corporation for their price.

George W. Cahoon and W. P. Stafford, for the appellant.

J. T. Gleason, and Bates and May, for the appellee.

START, J. The defendant did not take any corporate action with a view to repairing its buildings, and its trustees did not undertake to make the repairs upon the credit of the defendant. Hall, Harris, Thompson, and Vail were the defendant's trustees; but whether they were a majority of the defendant's trustees does not appear. These four trustees desired to repair the defendant's buildings; and shortly before the lumber in question was delivered, they made a personal and private arrangement among themselves, by which Harris and Vail were to put a heating apparatus into the buildings, Thompson was to furnish labor and make certain repairs thereon, and Hall was to furnish the lumber for such repairs. All this was to be done as a gratuity. The lumber was delivered by Hall, who was then president of the defendant's board of trustees, and a director of the plaintiff corporation. The lumber, prior to its delivery to Hall, was the property of the plaintiff and was charged to the defendant as it was delivered; but by whose direction the charge was so made does not appear.

1. The defendant's trustees did not authorize Hall to procure the lumber upon the credit of the defendant; on the contrary, it was understood and agreed that Hall should furnish the lumber as a gratuity. It does not appear that Hall ever undertook to pledge the credit of the defendant in procuring the lumber, except by inference from the fact that the lumber was charged to the defendant. If Hall did direct the plaintiff to charge the lumber to the defendant, such direction was without authority, and the defendant is not liable by reason of a purchase by its authority.

Hall had no authority, by virtue of his office of president, to purchase the lumber upon the defendant's credit. He could preside at the meetings of the board of trustees; beyond this he had no more authority than a single trustee. A single trustee or director has no power to act for the institution which creates his office, except in conjunction with others. It is the board of trustees or directors only that can act. If the board of trustees or directors makes a president, trustee, or any other person its officer or agent to act for it, then such officer or agent has the same power to act, within the authority delegated to him, as the board itself. His authority is, in such case, the authority of the board. It not appearing that Hall was authorized by a majority of the defendant's trustees to purchase the lumber in question upon the credit of the de-

fendant, the case must be disposed of upon the assumption that he had no such express authority: *Fairfield Sav. Bank v. Chase*, 72 Me. 226; 39 Am. Rep. 319; Cook on Stocks and Stockholders, secs. 712, 716; *Ashuelot Mfg. Co. v. Marsh*, 13 Cush. 507.

It is claimed that authority in Hall, as president of the defendant corporation, will be presumed. The weight of authority is against this claim, and surely no such presumption can exist when, as in this case, want of authority clearly appears. If Hall had express authority to purchase the lumber upon the credit of the defendant, or general authority to act for the board of trustees, or had exercised the powers conferred upon the trustees, with their knowledge and acquiescence, to such an extent as to justify the presumption that such authority had been delegated to him, then the court below should have found such authority; there is nothing before this court from which Hall's authority can be presumed.

It not appearing that Hall, Harris, Thompson, and Vail were a majority of the defendant's trustees, authority to repair the defendant's buildings is not shown. From aught that appears in this case, the repairs were made without the knowledge or consent of a majority of the defendant's trustees, or the knowledge or consent of any one authorized to act for them, or for the corporation. Hall, Harris, Thompson, and Vail, in undertaking to make these repairs, did not profess to act for or to bind the defendant. They were volunteers undertaking to do what, presumably, the defendant could not do for want of funds. If under such circumstances corporations are to be held liable, then every corporation holds its property by a very uncertain and insecure tenure.

2. The plaintiff claims the defendant is liable by reason of its having received and used the lumber. It is true that the law usually implies a promise to pay for property transferred from one party to another, but this rule does not apply when there is an express contract, nor where it is understood by the parties that the property is not to be paid for: *King v. Woodruff*, 23 Conn. 56; 60 Am. Dec. 625; *Waite v. Merrill*, 4 Me. 102; 16 Am. Dec. 238; *Weir v. Weir's Adm'r*, 3 B. Mon. 645; 39 Am. Dec. 487; *Walker v. Brown*, 28 Ill. 378; 81 Am. Dec. 287. If there was a contract with the defendant, it was the arrangement made among the four trustees, by which Hall was to furnish the lumber as a gratuity, and the lumber

was delivered to the defendant by the party agreeing to so furnish it. The defendant's officers had a right to treat the lumber as delivered pursuant to this agreement. There was nothing to put them upon inquiry, or to lead them to believe the lumber was being otherwise delivered, and it appears from the findings of fact that Harris and Vail supposed the lumber was so delivered. It does not appear what understanding Hall and Thompson had regarding this, but nothing is shown that would justify a different understanding on their part. And it does not appear that any of the defendant's trustees knew, at the time the lumber was received and used, that it was charged to the defendant. Under these circumstances, the law will not imply a promise to pay.

It is claimed that it may be fairly inferable that Hall knew the lumber was charged to the defendant, and that his knowledge is imputable to the defendant, and, by reason of this, it is to be assumed that the defendant received and used the lumber knowing it had been procured upon its credit. Hall having no authority to bind the defendant by express contract, his acquiescence would not make the defendant liable. He could not by his silence bind the defendants when he could not do so by express contract. Hall was an officer in both corporations. When an agent of a corporation is also an agent of another corporation, and there are mutual dealings between the corporations through the intervention of such agent, the question of whether either corporation is to be charged with notice of what is known to the agent by virtue of his relation to the other corporation depends upon the circumstances of each case: *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332; 52 Am. Rep. 710; *Fairfield Sav. Bank v. Chase*, 72 Me. 226; 39 Am. Rep. 319. In view of Hall's undertaking to furnish this lumber as a gratuity, and his interest to conceal from the defendant the fact that he had, without authority, procured the lumber upon the defendant's credit, we hold that Hall's knowledge is not imputable to the defendant, and that there is no presumption that the defendant knew at the time it received and used the lumber that it was procured upon its credit.

3. It appears that the demand in this suit was sold to George Ide; that he called upon Harris, who was then president of the defendant corporation, for payment; that Harris, without authority from the trustees, proposed to personally make a small payment, and said the defendant had no funds

with which to pay the demand. Ide at other times called upon the president and treasurer for payment, and was told the defendant had no funds with which to pay. It was claimed these officers, by failing to deny the liability of the defendant on these occasions, have ratified Hall's acts, and that the defendant is bound by this ratification. A ratification of an act done by one assuming to be an agent relates back and is equivalent to a prior authority. When, therefore, the approval of a majority of a board of trustees is necessary to confer authority in the first instance, there can be no valid ratification except in the same manner. It not appearing that the president and treasurer were a majority of the defendant's trustees, or that authority to bind the defendant by contract had been conferred upon them by the trustees or corporation, they could not affirm an unauthorized contract made by Hall: *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203; Story on Agency, secs. 235, 239.

4. It is claimed that the defendant is estopped from denying its liability, by reason of its failure to disaffirm the contract claimed to have been made by Hall. This claim is not sustained by the facts. The essential elements of an estoppel are not found by the court below. The defendant was not called upon to disaffirm the pretended contract until it had knowledge that such contract had been made: *Saville v. Welch*, 58 Vt. 683. It does not appear that the defendant, or a majority of its trustees, had such knowledge prior to the bringing of this suit; nor does it appear that the plaintiff has been influenced, misled, or damaged by the acts of any one authorized to act for the defendant: *Boynnton v. Braley*, 54 Vt. 92; *Earl v. Stevens*, 57 Vt. 474; *Wooley v. Edson*, 35 Vt. 214.

5. The plaintiff claimed it had sold and delivered the lumber in question to the defendant, through the defendant's agent, Hall. The defendant claimed Hall was not its agent for that purpose, and that it did not purchase or receive the lumber from the plaintiff, but from Hall as a gratuity. The plaintiff claimed payment for the lumber so delivered by Hall. In view of these claims, the defendant had a right to show from whom, and under what contract or arrangement, it received the lumber; and for this purpose, the evidence showing the arrangement between Hall, Harris, Thompson, and Vail was properly admitted. It had a direct tendency

to show that Hall had no authority to procure the lumber upon the defendant's credit, and that the defendant received the lumber from a party other than the plaintiff under such circumstances as would preclude a recovery for the same by the plaintiff: *Aiken v. Kennison*, 58 Vt. 665; *Armstrong v. Noble*, 55 Vt. 428.

Judgment reversed, and judgment for the defendant and trustee to recover their costs.

CORPORATIONS — POWER OF PRESIDENT TO BIND, BY CONTRACT. — The president of a corporation has no authority as such to make contracts binding upon the corporation, except as to matters arising in the ordinary course of the business of the corporation: *Blen v. Bear River etc. Mining Co.*, 20 Cal. 602; 81 Am. Dec. 132, and note; *Mt. Sterling etc. Road Co. v. Looney*, 1 Met. 550; 71 Am. Dec. 491, and note; *Getty v. Milling Co.*, 40 Kan. 281. The president of a business corporation may, without special authority, perform all acts which by usage are incidental to his office, and may bind the corporation by contract in matters arising in the usual course of business: *Sparks v. Despatch etc. Co.*, 104 Mo. 531; 24 Am. St. Rep. 351; *Sherman Center etc. Co. v. Swigart*, 43 Kan. 282; 19 Am. St. Rep. 134.

SALE, WHAT IS NOT. — No title passes under a contract of sale, where there is neither payment of the purchase price nor waiver of such payment: *Blackwood v. Cutting etc. Co.*, 76 Cal. 212; 9 Am. St. Rep. 199.

CORPORATIONS — AGENTS REPRESENTING TWO CORPORATIONS. — One who is a director in two corporations cannot represent them in transactions in which their interests are conflicting: *Memphis etc. R. R. Co. v. Woods*, 88 Ala. 630; 16 Am. St. Rep. 81, and note; *Pearson v. Concord R. R. Corp.*, 62 N. H. 537; 13 Am. St. Rep. 590. Where there are mutual dealings between principals through the intervention of a common agent, whether either principal would be affected by notice to such agent will depend upon circumstances, see extended note to *Bank of Pittsburg v. Whitehead*, 36 Am. Dec. 193.

CORPORATIONS — AUTHORITY OF OFFICERS TO RATIFY UNAUTHORIZED ACT. — A corporation will not be liable for a trespass committed by an agent, even though the act was authorized by the rules of its directors: *Brokaw v. New Jersey etc. Transp. Co.*, 32 N. J. L. 328; 90 Am. Dec. 659. The ratification of a contract of the president must be made with full knowledge of the terms of the contract: *Blen v. Bear River etc. Mining Co.*, 20 Cal. 602; 81 Am. Dec. 132. See *Hull v. Glover*, 126 Ill. 122; *St. Croix etc. Co. v. Mittlestadt*, 43 Minn. 91.

CORPORATIONS, ESTOPPEL OF, BY FAILURE TO DISAFFIRM UNAUTHORIZED ACTS. — There can be no implied ratification by a corporation of the unauthorized act of an officer or agent of a bank without actual knowledge of the transaction: *First Nat. Bank v. Drake*, 29 Kan. 311; 44 Am. Rep. 646; *Leggett v. New Jersey etc. Co.*, 1 N. J. Eq. 541; 23 Am. Dec. 728, and note. See note to *New York etc. Ins. Co. v. Ely*, 13 Am. Dec. 108, 109. Where a mortgage is given to secure a business note by the officers of a corporation, both the corporation and the officers are estopped to show want of authority to execute such mortgage: *Witter v. Grand Rapids etc. Co.*, 78 Wis. 543. See *McDonald v. Chisholm*, 131 Ill. 274.

STATE v. SWITZER.

[63 VERMONT, 604.]

FALSE PRETENSES — INDICTMENT — SUFFICIENCY. — An indictment for obtaining money or other property under false pretenses, framed in the words of the statute, properly setting forth the pretenses and alleging their falsity, is sufficient without averring that such pretenses were feloniously made.

FALSE PRETENSES OF EXISTING FACT. — False representations that persons named had in the past entered into an arrangement and agreement to furnish money to pay the defendant's debts, by virtue of which he obtained the signature of the defrauded party to a promissory note, are indictable as false representations of an existing fact.

FALSE PRETENSES SUFFICIENT TO DECEIVE — QUESTION FOR JURY. — The question whether or not the false pretenses alleged were such as were calculated to mislead a person of ordinary prudence cannot be raised by demurrer, but must be determined by the jury under all the facts of the case.

FALSE PRETENSES — INDICTMENT — INTENT MUST BE ALLEGED. — An indictment for obtaining a signature to a note by means of false pretenses must allege that such signature was obtained with design to defraud.

FALSE PRETENSES — INDICTMENT ALLEGING THAT SIGNATURE TO NOTE was obtained by means of the false pretenses alleged is sufficient, and a further description of them as "inducements" and "representations" is surplusage.

FALSE PRETENSES. — **INDICTMENT ALLEGING THAT SIGNATURE TO NOTE** was obtained by false pretenses, and setting forth the note in full, need not allege that the false making of the note was punishable as forgery.

FALSE PRETENSES. — **ALLEGATION IN INDICTMENT** that defendant obtained the signature to a note by means of false pretenses implies a further allegation of the delivery of the note to him.

FALSE PRETENSES. — **PROMISSORY NOTE** is within the meaning of a statute making it a crime to obtain the money or other property of another by means of false pretenses.

FALSE PRETENSES — LOSS TO VICTIM NOT ESSENTIAL. — The *gravamen* of the crime of obtaining money or property by false pretenses is in obtaining a person's money or property by means of such pretenses with intent to defraud him, and does not depend upon the ultimate loss to the victim, or whether in fact he sustains any pecuniary loss or not.

FALSE PRETENSES — INDICTMENT — SUFFICIENCY. — An indictment for obtaining money or other property by means of false pretenses, alleging that defendant made such pretenses designedly and with intent to defraud, is sufficient without alleging that he knew the pretenses alleged to be false.

Bates and May, for the appellant.

Harry Blodgett, state's attorney, for the state.

TAFT, J. The statute under which the respondent stands indicted imposes a penalty upon any one who designedly by false pretenses, with intent to defraud, obtains from another person money or other property, or the signature to any in-

strument, the false making of which would be punishable as forgery. It is insisted that each count is bad. There are fourteen in number. It is claimed that it should be alleged that the pretenses were made feloniously. The statute (Rev. Laws, sec. 4154) creates and defines the offense, and an indictment in the words of the statute, properly setting forth the pretenses and alleging their falsity, is sufficient; it need not be averred that the pretenses were feloniously made: See *State v. Daley*, 41 Vt. 564. It is further claimed that the pretenses are not within the statute; that they relate to acts to be performed in the future, — statements of something to take place in the future; i. e., that six men named were to pay the debts of the respondent at some subsequent time. We think in making this claim the counsel misconceive the purport of the allegations, which is, that the persons named had in the past entered into arrangement and agreement to furnish money to pay the respondent's debts, — a representation of an existing fact which would bring about a future result. In falsely pretending that such an arrangement and agreement had already been made, the respondent, in that respect, brought himself directly within the statute: *In re Greenough*, 31 Vt. 279. It is next claimed that the false pretenses were not such as to mislead a man of ordinary prudence. This question cannot be raised upon demurrer, for if the rule is as claimed by the respondent's counsel, whether the pretenses were calculated to deceive a person of ordinary prudence would be a question to be submitted to the jury under all the circumstances of the case.

An objection is made to certain counts that it is not alleged that the signatures or money therein named were obtained designedly. The obtaining, to constitute an offense, must be designedly, and for want of such an allegation, counts 1, 3, 4, 8, and 12 are insufficient.

It is sufficiently alleged that the signatures and money were obtained by means of false pretenses. The acts of the respondent are properly described as "false pretenses," and further describing them as "inducements," "representations," and "sayings" does not render the count defective. Describing the acts in the language of the statute is sufficient, and the better way, but a further description of them as sayings, etc., is objectionable in nothing but a tautological sense. The instrument to which the signature was obtained being fully set forth *verbatim*, it was unnecessary to allege a conclusion

of law,—that the false making thereof was punishable as forgery.

An allegation of the delivery of the notes to Switzer is implied in the averment that he obtained the signatures. He could not have obtained them without a delivery of the notes to him, or to some one for him. All the synonyms of the words “to obtain” indicate this as the proper construction. A promissory note is property, within the meaning of the words “or other property,” as used in the statute.

It is said that in the eleventh count there is no allegation of an intent to defraud. This is an error, as it is set forth that the respondent falsely pretended, etc., with the intent then and there, by means thereof, to defraud the said Tibbetts.

The claim that it is not alleged that no one of the six men named would furnish the money to pay Switzer’s debts, if not an absurdity, savors strongly of it. The allegation was unnecessary,—mere surplusage. The pretense alleged was, that six men named had agreed to furnish the money to pay Switzer’s debts. This was properly negated. If all had not made the agreement, the pretense was false, even if one of the six, or all of them, or Switzer himself, was ready to pay, and did pay. The *gravamen* of the offense is in making the false pretense, etc., and obtaining thereby a person’s property or signature, and does not depend upon the ultimate loss of the victim, or whether in fact the latter sustains any pecuniary loss or not. In *State v. Mills*, 17 Me. 211, it was falsely pretended by the owner of a horse that he was the horse called the Charley, and by that pretense the owner procured an exchange of horses; it was held that it was a false pretense, within the statute, although the horse falsely called the Charley was as good and of as great value as the real Charley horse.

The third and fourth counts being held defective for the reasons before stated, other objections thereto are not considered.

We hold that, under this statute, it need not be alleged that the respondent knew the pretenses were false; if it is alleged that he designedly made them, with intent, etc., the indictment is sufficient.

Judgment reversed, and cause remanded

FALSE PRETENSES. — For a complete and thorough discussion of the law relating to the criminal offense of obtaining money or other property under false pretenses, and the sufficiency of an indictment therefor, see *Barton v. People*, 135 Ill. 405; *ante*, p. 375, and extended note.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

FLEMING v. GUTHRIE.

[32 WEST VIRGINIA, 1.]

INJUNCTION AGAINST PERFORMANCE OF AN OFFICIAL DUTY IS VOID. — An injunction will not lie to restrain the secretary of state from delivering to the speaker of the house of representatives the sealed election returns for governor properly transmitted to him, and if granted will be treated as a nullity. Consequently a writ of prohibition will not lie in such case against a *mandamus* proceeding under a writ improperly granted to compel the delivery of such returns, when the only ground relied upon by the petitioner for the writ of prohibition is the fact that he is the plaintiff in the injunction which has been disregarded.

O. Johnson, J. W. St. Clair, and Brown and Jackson, for the petitioner.

J. A. Hutchinson and W. P. Hubbard, for the respondent.

SNYDER, P. On January 10, 1889, A. B. Fleming presented his petition to this court, in which he alleged that on January 9, 1889, he exhibited his bill in equity to A. N. Campbell, a circuit judge of this state, and obtained from him an injunction restraining Henry S. Walker, secretary of state, from laying before the legislature of the state the certificate of the commissioners of the county court of Kanawha County, purporting to ascertain the result of the general election held in said county on November 6, 1888, for the office of governor of this state; that after said injunction had been perfected and served upon said Walker, Nathan Goff, who was also a defendant to said bill of injunction, without any notice to the petitioner, applied to F. A. Guthrie, judge of the

circuit court of Kanawha County, in term, for a writ of *mandamus* to compel said Henry S. Walker, secretary as aforesaid, to do what he had been enjoined from doing by said bill; that Judge Guthrie, being fully advised of the existence of said injunction, announced from the bench that he would ignore and treat as naught said injunction, and thereupon he did ignore said injunction and award a *mandamus nisi* returnable at nine o'clock, A. M., on January 10, 1889, commanding said Walker, secretary as aforesaid, to forthwith deliver said certificate to the speaker of the house of delegates of the legislature; the said Walker has no personal interest in said injunction or *mandamus* proceedings; and that petitioner is the real and only opposing party in interest against the said Goff in any of said matters. The petition prayed for a rule against such Guthrie, judge, etc., and said Goff, to show cause why a writ of prohibition should not issue prohibiting said Guthrie, judge, etc., from holding for naught and setting aside said injunction, and prohibiting him and the said Goff from proceeding in said *mandamus* case without notice to petitioner, or opportunity for him to appear and defend his interests therein.

The rule was awarded as prayed for, returnable on January 11, 1889, at which time the respondents appeared and moved the court to quash the rule. On the motion of the petitioner, his petition was so amended as to show that the injunction bill averred that a writ of *certiorari* had been sued out of the circuit court of Kanawha County by petitioner, against the county commissioners of said county, to supervise and correct the action of said commissioners in canvassing the vote for governor at the election of November 6, 1888; that said writ had been sued out on January 4, 1889, and was still pending; and that said county commissioners had transmitted said certificate to said Walker, secretary, etc., on December 15, 1888.

The motion to quash the rule, after having been argued by counsel for the respective parties, was, on January 12, 1889, submitted to this court for its decision.

It is contended by the respondents that the injunction awarded by Judge Campbell, referred to in the petition, was void, because a court of equity has no jurisdiction to restrain a public officer from performing a plain duty required by the constitution. On the other hand, it is insisted for the petitioner, that if any jurisdiction existed for the injunction, then

the action of the circuit court in the *mandamus* proceedings is such an abuse of its powers and jurisdiction as will be prevented by prohibition. It is thus apparent that the important question is, Did the judge have jurisdiction to award said injunction?

In *Walton v. Develing*, 61 Ill. 201, it was held that "where the law plainly requires an officer to perform a duty, and he is not exceeding or abusing his powers, but fairly acting within the same, and a court issues a writ to restrain him from its performance, he must discharge his duty as prescribed by the law." That case was a proceeding for contempt against election officers for holding an election in disobedience to an order of injunction, and in which the court held that the injunction, having been issued without authority, was void, and that there no contempt in disobeying it. The court in its opinion says: "In such case, what must control the officer, — the mandate of the court or the plain behests of the law? The court, as well as the inferior officer, must be governed by the law. When the law imposes a positive duty upon a public functionary, and a court commands him not to perform it, he must obey the law and disobey the writ of the court."

In *Moulton v. Reid*, 54 Ala. 320, it was decided that a court of equity has no jurisdiction to enjoin the person declared elected to a municipal office from using his certificate of election, where the law provides for a contest.

In *Smith v. Myers*, 109 Ind. 1, 58 Am. Rep. 375, it was held that "the courts have no jurisdiction of a suit to enjoin the secretary of state from delivering to the speaker of the house of representatives the sealed returns, alleged to be wrongful and illegal, of an election for lieutenant-governor, which are directed to the speaker as required by law, in care of the secretary, and are to be delivered to him by the latter." The court in its opinion says: —

"It is a principle of constitutional law, declared in our constitution and enforced by many decisions of our own and other courts, that the departments of government are separate and distinct, and that the officers of one department shall not invade any other. To interfere by injunction in this case would involve a violation of this fundamental principle, as a conflict between two great departments of the government would result from an exercise of the jurisdiction invoked by the appellant. The general assembly has power to compel the attendance of persons at its sessions, and to compel the

production of papers which are necessary to enable it to justly and intelligently discharge its duties and exercise its functions. If the judiciary should enjoin the secretary of state from delivering to the speaker the papers described in the complaint, and the general assembly should demand their delivery to the officer to whom they are addressed, a conflict of authority would arise which no tribunal could effectually determine. If the secretary should, in such a case, yield to the demand of the general assembly, he would be in contempt of the authority of the court, and liable to punishment; if, on the other hand, he should disobey the command of the general assembly, he would be in contempt of its authority, and subject to punishment. If the general assembly should deem it the duty of the secretary of state to deliver the papers, it would not require the aid of the courts to compel its performance, for it possesses the power to coerce the production of papers and documents. . . . It is apparent, therefore, that as on the one hand the general assembly would not require the aid of the courts, by *mandamus* or otherwise, to compel the production of papers addressed, by direction of the constitution and the statute, to the presiding officer of one of its branches, so on the other hand, the courts cannot by injunction restrain it from obtaining those papers, nor by indirection produce that result by stopping them in the hands of one whom the law makes a mere custodian."

Our constitution and statute in respect to the question before us are almost identical with those of Indiana, and the facts in the case from which I have quoted and the one at bar are so nearly alike as to make the opinion from which the above quotation is taken a very apposite though not an absolutely binding authority in the case under consideration.

Without referring to other authorities, of which there are many, it is sufficient to say that according to well-settled principles of law, I am clearly of opinion that under our constitution and statutes a court of equity has no jurisdiction to award an injunction in a case such as the one made in the petition in this case. Our constitution (art. 7, sec. 3) declares: "The returns of every election for the above-named officers [one of whom is the governor] shall be sealed up and transmitted by the returning officers to the secretary of state, directed to 'the speaker of the house of delegates,' who shall immediately after the organization of the house, and before proceeding to business, open and publish the same, in

the presence of a majority of each house of the legislature, which shall for that purpose assemble in the hall of the house of delegates"; and ample provision is made by statute to compel the production of papers before either house of the legislature: Code 1887, c. 12, sec. 7. The eighteenth section of article 6 of the constitution provides that the regular biennial session of the legislature "shall commence on the second Wednesday of January," which for the year 1889 was on the ninth day of January.

It is thus shown that at the time the injunction in question was granted, the legislature was in actual session; indeed, it was presumably this very fact that prompted its issuance, for otherwise there could have been no delivery of the election returns by the secretary of state, and therefore no necessity for the injunction. And the legislature, a co-ordinate branch of the state government, being in session, and having exclusive control over the said certificate or election returns for governor, and possessing plenary power to compel their delivery the courts had no jurisdiction or control over said returns, by injunction or otherwise. They had been delivered to the secretary of state in the manner prescribed by law, before any proceedings had been taken in the courts in respect to them, as is shown in the petition in this case. As the statute (Code, sec. 23, c. 3) has made it the positive duty of the secretary of state to deliver the same to the speaker of the house, the said injunction was an absolute nullity, and constituted no ground for the refusal of said officer to discharge that duty.

It will be observed that the said injunction is the only ground alleged in the petition for the writ of prohibition; and while it is apparent from what we have already said that the *mandamus* complained of was improperly awarded by the circuit court, yet, as the petitioner does not by his petition show such interest or right as would entitle him to interfere in or complain of said *mandamus*, we cannot, at his instance, for any ground alleged in his petition, take cognizance of said proceedings, or award the writ of prohibition.

For these reasons, the motion to quash the rule is sustained, and the writ denied.

INJUNCTION — POWER TO RESTRAIN OFFICER FROM PERFORMING DUTY REQUIRED BY LAW. — An injunction will not issue to restrain the secretary of state from delivering the election returns to the speaker of the house of representatives, as he is required by law to do: *Smith v. Myers*, 109 Ind. 1; 58 Am. Rep. 375; nor to prevent the performance of political duties like those

committed to officers of registration: *Hardesty v. Taft*, 23 Md. 513; 87 Am. Dec. 584; nor to prevent municipal authorities from ordering an election in pursuance of law to select officers: *Murfreesboro R. R. Co. v. Board of Commissioners*, 108 N. C. 56; nor to stop an officer who is lawfully engaged in executing an order made by a court having jurisdiction of the proceeding: *Montgomery v. Waseem*, 116 Ind. 343.

CENTRAL LAND COMPANY v. LAIDLEY.

[82 WEST VIRGINIA, 134.]

DEED OF MARRIED WOMAN — DEFECTIVE ACKNOWLEDGMENT — EFFECT ON SECOND PURCHASER. — A married woman's deed conveying her land, made during coverture, but defectively acknowledged, is void as to a purchaser from her after her husband's death with notice of the former deed. He does not take as trustee for the first purchaser, but may maintain ejectment against him or his vendee.

DEED OF MARRIED WOMAN — DEFECTIVE ACKNOWLEDGMENT — ESTOPPEL. — Where a married woman's deed of her property, made during coverture, is void because defectively acknowledged, it cannot constitute an estoppel against her or her vendee after her husband's death, although the first purchase-money was received and invested in land in her husband's name, to which she asserted and acquired title during coverture.

DEED OF MARRIED WOMAN — DEFECTIVE ACKNOWLEDGMENT — RATIFICATION. — Where a married woman's deed made during coverture is void because defectively acknowledged, she cannot ratify it by mere admissions or recitals in other deeds or pleadings, or by other acts *in pais*. She can ratify it only by attaching a proper and sufficient acknowledgment thereto, or by executing another deed properly acknowledged.

DEED OF MARRIED WOMAN — DEFECTIVE ACKNOWLEDGMENT — LIABILITY OF SECOND PURCHASER TO REFUND FIRST PURCHASE-MONEY. — Where a married woman's deed is void because defectively acknowledged, and she conveys to a second purchaser after her husband's death, his title is perfect. He cannot be compelled to refund the purchase-money paid by the first purchaser, nor can it be charged on the land.

DEED OF MARRIED WOMAN — DEFECTIVE ACKNOWLEDGMENT — STATUTE OF LIMITATIONS AGAINST WIFE. — Where, in land conveyed directly to the wife, her husband is thereby vested with a life estate therein, and the husband and wife convey it to a party by deed which is void as to the wife, because defectively acknowledged, the purchaser is entitled to the possession until the death of the husband, and until then the wife or her grantee has no right of action to recover the possession; consequently the statute of limitations does not begin to run against them until his death.

J. H. Ferguson, and Simms and Enslow, for the appellant.

Brown and Jackson, and J. B. Laidley, for the appellee.

BRANNON, J. By deed dated the 18th of August, 1865, Rebecca J. Everett conveyed to Sarah H. G. Pennybacker, then a married woman, 240 acres of land now within the city

of Huntington. By a deed dated the 25th of February, 1870, Sarah H. G. Pennybacker and her husband, John M., united in a deed purporting to convey said land to C. P. Huntington; and by deed dated the 16th of October, 1871, Huntington conveyed it to the Central Land Company. Huntington took possession, and after him the Central Land Company, and it laid off a large part of said land into lots, streets, and alleys, sold many lots, and buildings have been erected thereon. Mrs. Pennybacker's husband died the 5th of May, 1881, and she, by deed dated the 26th of January, 1882, conveyed said land to John B. Laidley, who had full notice of said deed to Huntington when he took his conveyance. In March, 1882, Laidley brought an action of ejectment against the Central Land Company and others to recover this land, and on its trial there were a verdict and judgment for defendants. Upon a writ of error to said judgment, it was reversed, and the action of ejectment was remanded for retrial to the circuit court of Cabell County, where it is now pending.

On the decision by this court of the writ of error, as will be seen from the case of *Laidley v. Central Land Co.*, 30 W. Va. 505, the said deed from Mrs. Pennybacker and her husband to Huntington was held void because of defect of the certificate of the privy examination and acknowledgment of Mrs. Pennybacker.

Pending said writ of error, the Central Land Company brought a chancery suit against Laidley and others, alleging the facts above stated, and further, that Laidley procured his deed from Mrs. Pennybacker by misrepresenting to her that she was conveying a dower only, and paid her only five hundred dollars for it, whereas Huntington had paid eleven thousand dollars, and the land was worth at date of Laidley's deed thirty thousand dollars; and that it had sold divers lots to the Chesapeake and Ohio Railroad Company and others, who had built railroad tracks and houses thereon, and relying on adverse possession from the date of the deed to Huntington; and that Laidley, when he took his deed, had full knowledge of the deed from Pennybacker to Huntington, and from Huntington to the land company, and of the sales of said lots. Said land company further alleged that in 1872 Mrs. Pennybacker brought a chancery suit against her husband and others, in which she stated that she had, on payment to her of eleven thousand dollars consideration, conveyed the land to Huntington; that it was her separate estate; and

that her husband had agreed to invest the money in other land for her, but had wrongfully invested it in his own name in two farms, and which farms she sought to have declared her separate estate and conveyed to her; and that a decree had been rendered in said suit declaring her entitled to one of those farms—the Noel farms—by reason of the investment therein of money arising from said sale of her land to Huntington; that she and her husband had made a deed to one Parsons, duly acknowledged, conveying one acre, which in the deed to Huntington she had reserved, and that in the deed to said Parsons she recognized the Huntington deed in describing the one acre by the language, “and more particularly described in a deed of the party of the first part to C. P. Huntington.”

The bill contended that by reason of said deeds and the plaintiff's claim and possession of said land and the claim of Mrs. Pennybacker through said chancery suit and decree therein, recognizing said sale to Huntington and obtaining the benefit of its proceeds, and her recognition of the conveyance to Huntington in her deed to Parsons, and the knowledge on the part of Laidley of all the rights of all these parties, when he took his deed, the said land company had good title, which was beclouded and disquieted by Laidley's claim and action of ejectment.

It appeared that Mrs. Pennybacker had later suffered losses and was insolvent, and her husband's estate likewise, and not good for the warranty in said deed.

The bill claimed that Laidley held under his conveyance from Mrs. Pennybacker as trustee for the land company and others owning parcels of the land under it; and it prayed that he be required to convey said lands to them, and be enjoined from prosecuting said action of ejectment and other actions which Laidley had instituted against vendees of said company; or if such relief could not be had, that Laidley be required to refund the eleven thousand dollars which Huntington had paid Mrs. Pennybacker for the land, and that the land be charged with it.

Laidley filed an answer maintaining that by the deed from Pennybacker and wife, John M. Pennybacker passed only a life estate to Huntington, as the deed from Everett to Mrs. Pennybacker invested him with a life estate and her with a remainder in fee; and that Mrs. Pennybacker, by the deed to Huntington, did not convey her estate to him; and denying

that she received the eleven thousand dollars consideration from Huntington, and averring that her husband received and squandered it. He denies that he represented to her that she had only a dower, and avers told her her deed to Huntington was void, and she could recover a fee-simple. He denies all right of the plaintiff, and contends that he (Laidley) is not to be deemed a trustee holding the title for the company, and in all respects relies on his title, and resists at length the entire claim of the plaintiff.

The plaintiff filed an amended and supplemental bill setting up the sales of other parcels of land to other parties, and stating that since the filing of the original bill said writ of error had been determined, reversing said judgment in ejectment, and granting a new trial, and alleging again substantially the facts stated in the original bill, claiming that the plaintiff had superior equity, while Laidley held the legal title, and praying the same relief as was prayed for in the original bill.

Laidley answered, contesting the plaintiff's case from first to last, alleging that the deed to Huntington had been held void by the supreme court, asserting his title, and insisting that the plaintiff's title was void.

Mrs. Pennybacker filed demurrers to both bills, assigning various grounds. Laidley also filed demurrers to both bills, specifying various grounds. Voluminous depositions were taken by both sides. On the hearing, the bills were dismissed, and plaintiff took the appeal which we now decide.

This is a very important cause, involving the right to a large part of the growing city of Huntington. The deed from Pennybacker and wife to Huntington has been held by this court void as to the fee, because of defects in the certificate of the examination and acknowledgment of Mrs. Pennybacker. We must, in deciding this cause, start on our road with that fact settled, and follow the logical, legal sequences, lead where they may. A line of decisions by this court holds that a married woman's deed, with such defective certificate, is not merely voidable, but utterly void *ab initio*. No power can now change this rule but that of the legislature. This paper, though it has the form and semblance of a deed, is no deed in law as to Mrs. Pennybacker, and as to her passed no title whatever — not a shadow of title either legal or equitable — to Huntington; and in the language of the Maryland court in *Johns v. Reardon*, 11 Md. 465, is to be dealt with as though

Mrs. Pennybacker were no party to it. Therefore title remained in her, notwithstanding said deed, and she could and did pass it to Laidley by her subsequent deed to him.

Plaintiff admits that Laidley has the legal title, but contends that it has the equitable title, and that Laidley, taking his deed with knowledge of its rights, is in equity but a trustee holding title for the plaintiff's benefit, and should be compelled to convey to it. But the trouble which faces this position is, that Huntington's deed, being void, conferred no title on him, and his vendee has no shadow of title which the law can see. To affect a second purchaser with a first purchaser's right, that first purchaser must have a right known to the law, valid and enforceable, not one void, unknown to the law, and outside of its recognition. How can the law notice what does not exist,—a mere nonentity? Some right may exist *in foro conscientiæ*, but the *forum legis* knows it not. The statute is intended to protect the woman, to enable her to retain her estate, unless she convey it in the mode by it prescribed; but what good would her estate do her, if she could not after such void deed sell it? Under this argument, she could not sell it, for whoso would buy it would be affected with a trust for the first vendee. This would defeat the statute. The statute would thus, in one breath, say to her, You shall not convey, unless you convey in a certain mode; and in the next, As you have conveyed, though not in the mode prescribed, you shall never hereafter sell to another. This would be a gross inconsistency.

In the case of a married woman's void conveyance (*Mattox v. Hightshue*, 39 Ind. 95), it was held that "a right in equity cannot grow out of an illegal and void transaction." *Mustard v. Wohlford*, 15 Gratt. 329, 76 Am. Dec. 209, was a case where an infant sold land by title bond to Mustard, and later, when of age, sold the same land by title bond to Wohlford with notice of the sale to Mustard, and later conveyed it to Mustard pursuant to his sale to him, Mustard having notice of the sale to Wohlford. Wohlford sued Mustard and the vendor to cancel Mustard's deed and get title to himself, and succeeded. The court held that if an infant convey land, he may convey to another when of age, and his deed will avoid the first conveyance; and that the disaffirmance of the first sale by the second sale, after the infant has become adult, rendered the first sale void, and extinguishes any interest in law or equity which the first purchaser may

have acquired under it, and entitles the vendor or second purchaser in his name to recover possession of the land at law, and hold it free from any equity of the first purchaser.

That case logically, by analogy, rules this case. An infant's conveyance is not void, but voidable, whereas a married woman's deed without proper certificate is void at the start. If a man may purchase the infant's land after he becomes of age, with notice of a prior sale to another during infancy, vesting the first purchaser with title until avoided, and the second purchaser takes a better title than the first, and can call on equity to enforce his right by taking from the first purchaser his legal title acquired after the infant obtained his majority, pursuant to his sale in infancy, why cannot much more a second purchaser from a married woman acquire a better title than one who took from her a deed not voidable, but void at the instant of its execution? As Judge Agnew said in *Glidden v. Strupler*, 52 Pa. St. 402, in speaking of a married woman's void deed: "Equity cannot breathe life into a legal nonentity." 1 Story's Eq. Jur., sec. 177, says of married women's void acts: "Equity must follow the law, be the consideration ever so meritorious." Such void deed cannot be void in a court of law and valid in a court of equity, for the statute binds both. "What immunity or protection would a woman have from her incapacity to alienate her property, if it could be removed by changing the form of action from law to equity?" asks Judge Agnew in *Glidden v. Strupler*, cited above. And so the plaintiff's appeal to a court of equity from a court of law must be vain; for the iron rule of the statute in question binds both courts with its imperious power.

Another point is made by the able counsel of the plaintiff, based on the idea of estoppel; the argument being, that as she received the money under the sale to Huntington and used it, and some of it was paid for a farm in her husband's name, which she followed up by suit and secured and now enjoys, she cannot repudiate her conveyance to Huntington.

The statute was meant for her protection. Were she herself suing for her land, would any one question her right to recover? To forbid her would be a virtual repeal of the statute by the court. Had she sealed and delivered the deed and received the money, and there were no appearance of a certificate of acknowledgment, could she not recover it? To forbid her would deny her the protection the common law

and statute afford her. What is the difference between the two cases? This estoppel is based solely on or arises solely from the void deed, and is to bar a married woman. Herman on Estoppel, sec. 1099, says: "When an agreement is void for infancy or coverture, an estoppel founded solely on it must be equally void. The law throws its protection around infants and *femes covert*, and they cannot be made liable to a contract by their own representations." The supreme court of Indiana, in *Mattox v. Hightshue*, 39 Ind. 95, concerning a married woman's void deed, says: "A party can never be estopped by an act that is illegal and void." In *Glidden v. Strupler*, cited above, Judge Agnew says: "The next point is that of estoppel. If through the administration of equity we can produce a result which the law denies *ab initio* on grounds of public policy, then estoppel or compensation, its equitable equivalent, does what the law and policy have forbidden. But we have seen that in such a case equity does not overturn but follows the law." If Mrs. Pennybacker would not herself be estopped, neither would Laidley. In purchasing he did no wrong in the eye of the law. He but purchased from her an estate, which it was lawful for her to convey, and stands in her shoes invested with all her rights: *Rogers v. Higgins*, 48 Ill. 211.

Again, it is said that in the suit of Pennybacker against her husband and others, wherein she referred to the deed to Huntington, and claimed the money as her separate estate, and sought its proceeds, and by her reference in her deed to Parsons to the deed to Huntington, she recognizes that deed, and ratifies it. So it was contended in *Leftwich v. Neal*, 7 W. Va. 569, that letters of the married woman and other evidence tending to show that she admitted the validity of the deed, should be considered. Judge Paull said: "We think the testimony wholly inadmissible for the purpose." He cited *Elliott v. Peirsol*, 1 Pet. 328, quoting from that case the following language: "What the law requires to be done and appear of record can only be done and made to appear by the record itself." He quoted from *Barnett v. Shackelford*, 6 J. J. Marsh. 532, 22 Am. Dec. 100: "Parol evidence is not sufficient; it can only be proved by the record. If parol evidence should be admitted to establish it, then an acknowledgment by a *feme covert* before witnesses *in pais* . . . would be as good as an acknowledgment before the officer designated by law, and making up a record thereof in the manner prescribed

and thus the guarded provisions of our statutes might be substituted by a new branch of equity jurisdiction." In *Glidden v. Strupler*, 52 Pa. St. 402, it is held: "The contract of a married woman being void, it cannot be ratified unless by deed in the mode described by the statute."

The claim of plaintiff to compel Laidley by a charge on the land to repay the eleven thousand dollars purchase-money paid by Huntington cannot be sustained. Laidley was not a party to the deed from the Pennybackers to Huntington, and the claim is purely a personal demand, and only against the husband of Mrs. Pennybacker; and as Huntington's deed was void, and he thereby acquired no interest in or concerning the land, his payment does not attach to the land, or follow it into Laidley's hands: *Mustard v. Wohlford*, 15 Gratt. 329; 76 Am. Dec. 209. Even if the deed were valid, the covenant of warranty would not avail against Mrs. Pennybacker, as by the Code of 1887 (c. 373, sec. 6) such a covenant binds the woman no further than to pass her land. It could not charge the land, for that would measurably defeat the object of the law, declaring her deed not conforming to the statute void, and yet encumbering it with the purchase-money. She could not by deed of trust charge it without privy examination; yet under this theory she can indirectly encumber it to its full value by charging it with the purchase-money received under a void sale. Out of an act utterly void equity is to give birth to a lien which will sweep away her land, and thus indirectly do just what the act meant should not be done.

In *Scott v. Battle*, 85 N. C. 185, 39 Am. Rep. 694, it was held that the married woman's conveyance was a nullity, and the vendee had no lien on the land for purchase-money, and no right of action against the woman personally. The court, after showing why the deed was void by reason of the acknowledgment not conforming to the act, added: "It would seem that the same reasoning must be a full answer to the defendant's demand . . . for the restoration of the purchase-money. . . . In no case will the law imply a promise on her part, and every one who deals with her is held to do so with a knowledge of her disability."

As to the claim of adversary possession under the statute of limitations, this court held that the deed from Pennybacker and wife to Huntington, having been made prior to the enactment of the Code of 1868, containing section 3 of chapter 66, did not confer on Mrs. Pennybacker a separate

estate, but conferred on her husband a freehold estate, which would continue during the joint lives of husband and wife, with remainder to her. Huntington by the deed to him became vested with the freehold life estate of the husband of Mrs. Pennybacker, and he and his vendees had right to possession as long as her husband lived, and she or Laidley had no right to that possession until his death, which occurred May 5, 1881. Thus her right of action did not accrue until then, and the ejectment was brought the 28th of March, 1882. The action is not barred: *Bolling v. Teel*, 76 Va. 487; Wood on Limitations, 527, 528; 1 Rob. Pr. 508-510; Tyler on Ejectment, 923, 946; 3 Washburn on Real Property, 132, 133; *Ball v. Johnson*, 8 Gratt. 285; *Merrit v. Smith*, 6 Leigh, 493.

The case of *Shivers v. Simmons*, 54 Miss. 520, 28 Am. Rep. 372, is greatly relied on by the appellant. The *syllabus* is: "A married woman who on exchanging lands received a perfect deed, but gave one the certificate of acknowledgment to which was fatally defective, is estopped, when nine years thereafter the defect is discovered, to assert her title, if she has sold the lands received, and with the proceeds purchased others." This was a case of exchange, it may be noted. The judge delivering the opinion says: "We do not say that a mere reception of the purchase-money would estop her, where she had attempted to convey by an invalid deed, though it seems difficult to see how the purchaser's title is void in the one case and not in the other. It is true, on the other hand, that a man who has made a conveyance wholly inoperative under the statute of frauds will not always be estopped by a reception of the purchase-money, and that the remedy of the vendee ordinarily is by an action for its recovery. But that is not the case before us. Mrs. Shivers bargained for an exchange of lands with the appellee." So, according to that court, that case is not exactly in point here.

The case of *Warner v. Sickles*, Wright, 81, is also urged by the appellant, wherein there was a sale of land by a married woman, who afterwards conveyed it to a third person with notice of the first sale, and the second purchaser was held to hold for the first purchaser, and was decreed to convey to him. The court thought the title bond of the *feme* void, and that it could not be enforced against her or her heirs, yet said she had no interest to protect, but had conveyed to a third person, and for that reason held that third person a trustee. How the instrument could be utterly void as to the *feme* and

her heirs, and not enforceable against them, and yet valid against one who purchased from her by proper deed, and became vested with her estate, I cannot see. The conclusion seems illogical.

We do not think these cases propound the law correctly, and we cannot follow them.

As to the charge that Laidley obtained his deed by misrepresentation and fraud, and for inadequate price, we express no opinion, for the Central Land Company, having no interest in the estate, by reason of the void deed, cannot avail itself of such misrepresentation, fraud, and inadequacy, if that allegation were ever so well sustained.

The decree of the circuit court of Summers County is affirmed, with costs to appellee.

DEED OF MARRIED WOMAN — DEFECTIVE ACKNOWLEDGMENT. — A married woman can only pass her property in the statutory mode; therefore the burden is on the party claiming under a deed from a married woman to prove that it was correctly acknowledged: *Logan v. Gardner*, 136 Pa. St. 588; 20 Am. St. Rep. 939, and note. A married woman's deed without the prescribed acknowledgment conveys no title: *Hayden v. Moffatt*, 74 Tex. 617; 15 Am. St. Rep. 866, and note; *Martin v. Dwelly*, 6 Wend. 9; 21 Am. Dec. 245, and note.

DEED OF MARRIED WOMAN — DEFECTIVE ACKNOWLEDGMENT — ESTOPPEL. — A married woman who becomes a *discover* may be estopped by her acts, the same as other persons: *Logan v. Gardner*, 136 Pa. St. 588; 20 Am. St. Rep. 939, and note. The doctrine of estoppel applies to married women as to all acts performed by them: *Crenshaw v. Julian*, 26 S. C. 283; 4 Am. St. Rep. 719, and note.

KANAWHA VALLEY BANK *v.* ATKINSON.

[32 WEST VIRGINIA, 203.]

FRAUDULENT CONVEYANCES BETWEEN HUSBAND AND WIFE — EVIDENCE. —

As against the creditors of a husband, the law will not, from the mere delivery by the wife of her money to her husband, or from the permitted receipt by him of her separate income, imply a promise by him to repay her, but will exact a promise, expressed in terms, or implied from circumstances clearly proving that they dealt with each other as debtor and creditor.

FRAUDULENT CONVEYANCES FROM HUSBAND TO WIFE. — Where a wife knowingly permits her husband to mingle her money and the proceeds of her separate estate with his own, and to use it in his business for years, without requiring any note therefor from him, or keeping or having kept any account thereof, and after the lapse of the period of limitation from the time that the money was thus received, the insolvent husband purchases land in the name of the wife, claimed by them to have been paid for with the money thus received, and they afterwards give a

joint deed of trust thereto to secure the debt of the husband, the land so purchased is subject to a judgment rendered prior to the purchase in favor of the husband's creditor, after the satisfaction of the trust deed.

J. F. Brown, for the appellant.

W. J. W. Cowden, for the appellees.

BRANNON, J. On the 20th of November, 1874, the Kanawha Valley Bank recovered a judgment in the circuit court of Kanawha County against Charles T. Duling, Herman L. Gebhart, and George W. Atkinson, for \$861.92, and on the 31st of March, 1885, it brought a suit in equity in the circuit court of Ohio County against Ellen Atkinson and others, alleging in its bill the recovery of this judgment and its non-payment, and that on the 2d of January, 1882, the United States Building, Land, and Loan Association of Wheeling conveyed to Ellen Atkinson a lot of land on Twelfth Street, in the city of Wheeling, for the consideration of three thousand three hundred dollars, and that said consideration was paid by George W. Atkinson, her husband, out of his own funds; that he purchased it from the association, and that Ellen Atkinson paid no part of it, and that George W. Atkinson was largely indebted at the time, and used the name of his wife, and had the lot conveyed to her, to delay, hinder, and defraud his creditors; that said Atkinson, on January 17, 1885, borrowed from the Commercial Bank fifteen hundred dollars, and secured it by a deed of trust on said lot, executed by his wife and himself; and alleged that he was insolvent. The bill prayed that said lot be decreed to sale for said debt of plaintiff, and that the deed to Mrs. Atkinson be held void as to said bank.

Ellen Atkinson answered, admitting the debt of plaintiff, her husband's insolvency, and the deed of trust to the Commercial Bank for money borrowed by her husband, but denying that the consideration of the conveyance to her of said lot was paid by her husband, or that he purchased, or that he used her name in the conveyance to defraud his creditors, or that she never paid any consideration deemed valuable for the lot. She averred that she married on the 8th of December, 1868, and when she married, she and her sister owned a lot in Charleston, vested in a brother, as trustee, and she having bought her sister's share, it was conveyed to her the 21st of March, 1870; that on the 8th of February, 1871,

Bessie Eagan, her sister, purchased a lot in Charleston, and on the 10th of March, 1871, she, Ellen Atkinson, and Bessie Eagan traded properties, and said Ellen received in the exchange a property in Charleston called the Moore property; that on the 1st of November, 1872, she, her husband joining in the deed, conveyed to Smith and Gilligan a portion of said lot for four thousand dollars, and on the 15th of August, 1874, conveyed the balance to A. C. Fellars for five hundred dollars; that with part of the money received from said two pieces of property she purchased from the Methodist Episcopal Church the parsonage property in Charleston, paying for it two thousand dollars cash; this last-mentioned property, on February 1, 1883, she and her husband conveyed to J. D. Pubbs for fifteen hundred dollars; that it was from these transactions with the money she received from the sales of her separate estate the purchase-money was paid to the said association for said lot in Wheeling. She denied all allegations of fraud.

George W. Atkinson answered, admitting the indebtedness and his inability to pay his debts. He alleged that it was not true that the consideration for the Wheeling property was paid by him, or that he used the name of his wife in its purchase to defraud his creditors, and averred that the consideration for the property was paid wholly with money belonging to his wife; that when he married her she owned real estate in Charleston which was exchanged for other real estate, from the sale of which \$4,750 was realized, and said Wheeling property paid for out of it. He admitted that the deed of trust to the Commercial Bank was for a loan to him. Depositions were taken. On the hearing, plaintiff's bill was dismissed, and it appealed here.

It is clear from the evidence of George W. Atkinson and Mrs. Atkinson that the proceeds of the sale of her Moore property went into his hands and with her knowledge; that he gave her no note for it nor any memorandum touching it. She declined to receive a note for it, as he definitely states. No written account of moneys proceeding from her property, though there were several transactions, or of rents arising from it, was kept by either of them. He made no deposit in bank or elsewhere to her credit, or to himself as her trustee or agent in any manner designating it as a special fund distinct from his own money. Other moneys he certainly had during the years covered by the transactions per-

tinient to this case, for he was holding lucrative offices under the United States government, — postmaster at Charleston, collector of internal revenue, and United States marshal, — and he had a bank account, as he speaks of drawing checks on bank. Moreover, it cannot be said that the money arising from the sale of her property or its rents went to acquire the Wheeling property rather than any of his own proper money derived from other sources, for he mingled it with his and used it for years in his business. His own deposition shows this.

He said: "The three thousand three hundred dollars was paid by me as agent for my wife out of her funds, which I held in trust for her." When asked how long he had held in trust funds of his wife, he answered: "From the time it came to my hands from the sale of the Charleston property until it was paid over for the Wheeling property." Being asked as to the character of the trust, he answered: "It was a positive understanding between us that the money was hers; that it should not be taken from her, but be forthcoming when her needs required it. I offered to give her notes, but she declined to receive them, for the reason that she knew that I would not defraud her out of it, and the further reason that neither of us considered it necessary, in a legal point of view, to pass notes between us." He further said: "It was a verbal contract. It was at various times, and, as I have stated above, no notes were given. The only evidence of the contract was the verbal acceptance of it. It was a verbal contract between man and wife, which should be held sacred, and I have ever regarded it such." Asked to state definitely the time when he received \$4,750, which he admitted having received from her property, he answered: "I cannot. I have no means of arriving at the exact date." When asked to state what he did with the money immediately on its receipt, he says: "I cannot for the life of me answer that question." He stated, also, that the money was received at different times, and he could not say definitely the disposition he made of the money at the time; and that two thousand dollars of it was paid on the Methodist Episcopal Church lot in Charleston, and some of it was on the purchase of the lot in Wheeling.

He was asked to state, outside of the two thousand dollars paid the Methodist Episcopal Church, what disposition was made of any part of the \$4,750, — where it was, or how it was used up to the time of the purchase of the Wheeling lot, — and

he replied: "I cannot definitely furnish you the desired information. I held it in my possession and may have used it temporarily in some of my business undertakings, but it was always understood that it should be forthcoming, or its equivalent, when needed by my wife." He further stated that he held the money in trust and paid the same to her creditors "out of my own resources," either growing out of the funds I held for her and may have used in my own affairs, or out of my earnings in my business undertakings." He was asked: "Can you not state more definitely the immediate sources from which you got the money you paid for the property on Twelfth Street, in Wheeling?" He answered: "I cannot." He further stated: "It may be that I borrowed temporarily from A. F. Gibbons funds to help make up a sufficient sum to pay one or more of the notes of my wife due for the purchase-money of the property mentioned in the bill. I have stated over and over again that I had received from my wife in trust for her, and as her agent, a sum or sums of money greater than the amount paid by her in the purchase of the property mentioned in the bill, and that the money so received from her was held by me in trust for her, and frequently used by me in my personal transactions, but when the money was required by her it was always forthcoming."

He was asked: "Was the money held by you in trust for your wife so held or placed that you could distinguish it from your own money?" and answered: "It was not in the general handling of it, but at all times I kept a careful account of the same, so that I could at any time answer the question as to how much of her funds I had in my possession." When asked when and how the account was kept, and where it was then, he answered: "The transactions involved only real estate, and when a piece of property was sold, the amount, of course, was known to both. It was therefore a very easy matter to keep track of the amounts without keeping a written record. I do not remember whether either of us ever made any entry of these transactions in writing. There never was a time, however, when it was not known to both of us the exact amount I held for her." He then stated he owed her a balance of \$350, exclusive of interest.

He was then asked to state the receipts and disbursements, and replied: "I received \$4,750 from the sale of the Capitol Street property. I paid \$2,000 for the Methodist Episcopal Church parsonage. This left a balance in my hands to her

credit of \$2,750. I received from the sale of the parsonage property \$1,500. This would make \$4,250 of her money which I held in trust. I paid for her on the property mentioned in the bill \$3,300. This would leave a balance due her of \$950. Deducting from this the amount paid by her on the Mountain Lake property, \$500, would leave a balance to her credit of \$450. You will see from my last answer I made a clerical error of \$100 when I said \$350."

He was then asked if the above moneys constituted all that he held in trust for his wife, and he answered: "I presume it does not, although I cannot now think of any sum." His wife stated that he collected rents. He further stated that his wife did not directly exercise direction or control as to any property held in trust for her, but always felt that her funds would be forthcoming "at her call, should I live, without any note or bond, and if I should die, I carry enough life insurance to make her comfortable." When asked where he got the five-hundred-dollar cash payment on the Wheeling lot, he answered: "I cannot answer that question, as I do not remember." When asked where he got the money to pay the second five-hundred-dollar payment, he answered: "I cannot answer that definitely, as I kept no separate accounts from whom I received funds due me from persons with whom I had business transactions." He made the same answer as to the third five-hundred-dollar payment. When asked by whom a further five-hundred-dollar payment was made, he answered: "My recollection is, I paid it as the agent of my wife." These quotations furnish, substantially, the case as put by the defendant G. W. Atkinson. The defense rested on the evidence of G. W. Atkinson and wife.

It cannot be said that the specific money from her property was paid on the purchase of the Wheeling property. It came from his general funds. He denominates it a "trust." He may honestly so regard it, but to merely denominate it a "trust" does not make it a trust, unless the facts in law make it one. A trust must have a definite, certain subject-matter: Hill on Trustees, 44. The trust will not be executed, unless the precise nature can be ascertained. It must have a specific, certain object, if express: 1 Perry on Trusts, sec. 83. Mrs. Atkinson says: "At my own request my husband took charge of my money to keep it for me. I knew he would be a much safer person to have care for it than I. I don't know anything about how it was used. He had it for me. He pledged

himself, that at any time I wanted it to invest in a home, it would be forthcoming. He pledged himself solemnly to that." But viewed in the most favorable light, is this anything but a loan from her,—a deposit for safe-keeping until called for? He was not charged with selecting and buying a home. No specific instruction of that kind was given him by her, nor any undertaking on his part to do so, even according to her evidence. He was not a trustee to invest the fund. But when the question was propounded to him: "What was the character of the trust on which you held the money?" his answer was: "It was a positive understanding between us, that the money was hers, that it should not be taken from her, and that it should be forthcoming when her needs required it." He specifies no particular trust of legal outline or certainty with a specific object in view, and he does not say with Mrs. Atkinson that he pledged himself to have the money when she should want a home. The most that can be said of it is, that George W. Atkinson was a mere holder or loanee of this money.

And here it is proper to say that the contention that a trust existed is not set up in either of the answers of George W. and Ellen Atkinson; the position taken by way of defense in them being, that the Wheeling property was paid for, not by George W. Atkinson, but by the proceeds of the sale of her separate estate, and neither answer alleges that the money therefrom went into the husband's hands by way of trust for any purpose. This defense is first found in the depositions; but the depositions cannot be read to support a trust not set up in the answer, for the rule of pleading is, that the *allegata et probata* must both exist and correspond, and the *probata* can perform no function unless preceded by *allegata*. Matters not charged in the bill or averred in the answer cannot be considered on the hearing: *Hunter's Ex'rs v. Hunter*, 10 W. Va. 321. Could it be regarded a trust for the purchase with her particular fund of the Wheeling lot, the case would have more strength, especially as to limitation. Can we uphold it as a loan?

Wells on Married Women, p. 371, sec. 370, on the authority of *Schaffner v. Reuter*, 37 Barb. 49, and *Savage v. O'Neil*, 44 N. Y. 298, says: "As to loans between them, it has been held that where a conveyance made by a husband to a wife is only a fair equivalent for money borrowed of her, and is free from actual fraud, although executed after the debt has

been incurred by him, it is supported by the antecedent equitable obligation to pay it, and in legal effect relates back to the time of the loan, so as, of course, to cut out any intervening creditor of the husband. Being equitably bound to pay, he may do so voluntarily, either in money or other property; and if a creditor undertakes to impeach it, the burden is on him to show *mala fides*,—that is, where a loan or the indebtedness of the husband to the wife is *prima facie* established; for where a wife claims a debt due her, she must, like any other person, show it in some way." And in *French v. Motley*, 63 Me. 326, it is held that other creditors of a husband cannot complain if he prefers to discharge a debt to her rather than to them. So in *Brookville Nat. Bank v. Kimble*, 76 Ind. 195, this position is said to be well settled in that state by several cases. So in *Steadman v. Wilbur*, 7 R. I. 481.

To the general proposition, that if a clearly valid subsisting debt in favor of a wife against the husband were fully proven, he might pay it directly, or indirectly, if he preferred to do so, by paying another for conveying property to her in discharge of said indebtedness, I would accede. But it is to be noted that, under the rule above quoted from Wells, a loan, a distinctive loan, as distinguished from a gift, must be established. In the Rhode Island case, which is as liberal as any towards the wife in this matter, it is held: "The law will not, from the mere delivery by her of her money to him, or from the permitted receipt by him of her separate income, imply a promise by him to repay her, but will require more,—either an express promise or circumstances to prove that in such matter they dealt with each other as debtor and creditor." The chief justice, in delivering the opinion in that case, says: "She cannot, when her husband becomes insolvent, convert into debts, as against his creditors, former deliveries to him of her money or other property, or permitted receipts by him of the income or proceeds of sale of her separate estate, which, at the time of such delivery or receipt, were intended by her as gifts, to assist him in his business, or to pay their common expenses of living; and considering the relation between them, the law would not, merely from such delivery or receipt, imply a promise on his part to repay or replace, as in cases not thus related, but would require more, either in express promise or circumstances, to prove that in these matters they had dealt

with each other as debtor and creditor." It was so held, also, in *Edelen v. Edelen*, 11 Md. 415.

It would be exceedingly dangerous to the business world to have a loose principle in this matter, and would open a wide door for the defeat of honest creditors. A husband and wife embark on the voyage of life together, expecting to meet the waves together, devoting to the support of themselves and children, and to his success, their common efforts and their several means. She is always willing, from affection for her husband and interest in his success, to extend him the help of her means, his business interests being in a large sense her interests, never expecting any return of the means she commits to his hands; and if, after he has had those means employed in his business for years, mingled indiscriminately with his, it were permitted to her, when misfortune overtakes him, to raise up loans to the prejudice of his creditors, and support them by his own and her evidence, after creditors had trusted him in total ignorance of such loans, and he were allowed to use his means in purchasing real estate in her name, a wide road would be opened for the promotion of wrong against honest creditors. Better that there should be individual cases of hardship than that such dangers should stand in the way of the business world. If any one must suffer, better that even the helpless woman suffer than honest creditors, whose means or property were perhaps consumed in furnishing shelter, food, and raiment to the wife and her children.

In this case the husband had had the proceeds of the sale of the Moore property, except what was invested in the church lot, some of it eight, some nine, some ten years nearly before the purchase of the Wheeling lot, and his wife's right of action for it as a loan had become barred. In *Crawford v. Carper*, 4 W. Va. 56, where a party had given a note to his father-in-law for money and property advanced at different times, for which no notes were taken at the time of the advancement, and of which no account was kept, and judgment was confessed on the note, and such note and judgment were attacked by creditors for fraud and were overthrown, Brown, president of the court, without passing on the question whether it was a just debt or not, but waiving that as unnecessary, said: "These debts thus acknowledged, and for which the note was given and judgment confessed, were all barred by the statute of limitations. And while it was all

very right, if they were just and real, that they should be paid as between the parties, yet still the important question remains, whether, under the circumstances of the case, it could be done so as to intercept the other *bona fide* creditors whose debts were not so barred. And I am free to say I think it could not, because it comes clearly within the first section of chapter 118, Code of 1860, and is just such a case as it was the intention of the statute to prohibit."

Here the husband mingled the wife's money with his own; no note was ever given by him to her; no account kept; and he used it in his business. He collected some rents from the realty, as his wife says, and no account is kept. This is all right, — as between husband and wife, very natural; but it does not answer the rigid requirements of the law, when the wife, after her husband's insolvency, seeks to set up indebtedness in her favor. And again, the fact that the wife in 1885 united in a deed of trust conveying the Wheeling property to secure the large sum of fifteen hundred dollars, purely a loan by the bank to her husband, tends to confirm the idea that it was substantially his property.

A line of decisions in our state, made up of many well-considered cases, goes far in behalf of creditors against fraudulent conveyances; and there is perhaps no state in the Union whose decisions go further to vindicate the rights of honest creditors over such conveyances, especially when between relatives, and more especially between husband and wife.

In *Burt v. Timmons*, 29 W. Va. 441, 6 Am. St. Rep. 664, it is held: "Transactions between father and child, brother and sister, husband and wife, or between others between whom there exists a natural and strong motive to provide for a dependent at the expense of honest creditors, if such transaction is impeached as fraudulent, may be shown to be fraudulent by less proof, and the party claiming the benefit of such a transaction is held to a fuller and stricter proof of its justice and fairness, after it has been shown to be *prima facie* fraudulent, than would be required if the transaction was between strangers"; and that "when a wife purchases land or other property, the burden is upon her to prove distinctly that she paid therefor with funds not furnished by her husband. Evidence that she purchased amounts to nothing, unless it is accompanied with clear and full proof that she paid for it with funds furnished by some one other than her husband." And the court also held that "a transfer of property, either directly

or indirectly, by an insolvent husband to his wife, is justly regarded with suspicion, and unless it clearly appear to have been entirely free from wrong intent to withdraw the property from the husband's creditors, or the presumption of fraud be overcome by satisfactory affirmative proof, it will not be sustained."

Herzog v. Weiler, 24 W. Va. 199, *McMasters v. Edgar*, 22 W. Va. 673, and other cases of same general principle, might be cited. Particularly in *McGinnis v. Curry*, 13 W. Va. 29, where a transaction, by which the proceeds of the sale of the wife's land went into the husband's hands, was held to be a gift by her, not a loan, there is a strong leaning towards the position that where a wife allows the proceeds of the sale of her separate estate to go into her husband's hands and so remain for years, especially when he uses and invests it in business, it is to be taken that the parties did not deal as debtor and creditor, that they did not contemplate the creation of debt, but a gift rather than a loan.

I may say that I have struggled hard to sustain this conveyance, but under the facts of the case and the decisions referred to, considering their letter and spirit, I find myself unable to do so. Our decisions are rigid, it must be admitted, but on the whole are right, and promotive of the highest good faith (*uberrima fides*) between debtor and creditor, and should not be relaxed.

Reference is made by counsel for plaintiff to the fact that Mrs. Atkinson's earnings went to pay her sister for her interest in the home property, which was exchanged by Mrs. Atkinson for the Moore property, and that such earnings were the property of the husband, and that as the Moore property entered into the purchase of the Wheeling lot, such earnings may be followed up. Such earnings would be the husband's: *Bailey v. Gardner*, 31 W. Va. 94; 13 Am. St. Rep. 847. So the ready money which she owned at marriage, and the furniture, which she sold, which money, furniture, and earnings went to acquire the sister's half in the home property, would be the husband's. But on March 21, 1870, the home property was conveyed to Mrs. Atkinson, and it does not appear that the plaintiff's or any debt then existed against the husband, and he could lawfully allow such earnings, furniture, and money to be invested for her use; he could give it to her. True, the fact may not be wholly irrelevant to be considered with the other circumstances in

determining whose property is the Wheeling lot, but its weight does not seem to be important.

The decree complained of is to be reversed, with costs against Atkinson and wife, and the cause remanded to the circuit court of Ohio County, with instructions to ascertain the amount of the debt of the Commercial Bank under its deed of trust, which appears to have priority, and enter a decree subjecting the said lot on Twelfth Street, Wheeling, to said Commercial Bank's debt and plaintiff's judgment in the bill mentioned, and for further proceedings.

HUSBAND AND WIFE—WHEN LATTER IS CREDITOR OF FORMER—PRESUMPTION.—A wife who for years has permitted her husband with her knowledge to use the income of her separate property is presumed to have made a gift of it to him which can only be overcome by proof of an understanding that he was to account for it: *Estate of Hauer*, 140 Pa. St. 420; 23 Am. St. Rep. 245, and note; *Beecher v. Wilson*, 84 Va. 813; 10 Am. St. Rep. 883, and note. Where a wife loans money to her husband to enable him to make a payment on land purchased in his name, the relation of debtor and creditor is created: *Torrey v. Cameron*, 73 Tex. 583. A wife who loans money to her husband without notice to others is not estopped as against other creditors to assert her claim for the money: *Payne v. Wilson*, 76 Iowa, 377. As to what evidence is competent to establish a gift from the wife to the husband, see *Whitaker v. Marsh*, 62 N. H. 477.

BUSHONG v. RECTOR.

[32 WEST VIRGINIA, 311.]

WRIT OF POSSESSION—WHO MAY BE DISPOSSESSED UNDER.—A writ of possession against the husband, in an action of ejectment to which the wife is not a party, is ineffectual to dispossess her of land on which she lived, and which she had title to and claimed as her separate estate prior to the commencement of the action in ejectment.

WRIT OF POSSESSION—WHEN MAY BE ENJOINED.—An injunction will lie to restrain the execution of a writ of possession as to a wife's separate estate, when such writ issued in an action in ejectment against her husband to which she was not a party.

R. H. Smith, for the appellant.

J. A. Hutchinson, for the appellee.

BRANNON, J. In July, 1882, Enoch Rector brought an action of ejectment in the circuit court of Wood County against Daniel Bushong and O. M. Bushong for one hundred acres and thirty-one poles of land, and in November, 1883, recovered judgment and issued a writ of possession, when Elizabeth Bushong obtained an injunction against the enforcement of

the writ as to her. Rector answered the bill, denying plaintiff's right, and depositions of numerous witnesses were taken, and the court dissolved the injunction and dismissed the bill, reserving right to Elizabeth Bushong to defend or prosecute any right or claim which she might have relative to the land in any proceedings at law.

The record shows that by deed of May 21, 1880, one Peter Curry conveyed the land to Elizabeth Bushong, who is the wife of O. M. Bushong, which deed was recorded June 3, 1881; and it also shows a deed dated February 16, 1874, recorded April 25, 1882, from Daniel Bushong to Rector. Daniel Bushong was in possession, though not under any title, so far as appears, eight years before he made the deed to Rector in 1874. The land had belonged to an oil company which suspended operations and abandoned the land, and Bushong simply took possession of it as if there was no owner. Rector was owner of two thousand dollars stock in the oil company, and set up a claim to the land on that account, and sought possession in order to thereby obtain title, as he says. Upon his conveyance to Rector, Daniel Bushong took a lease for one year, in writing, from Rector, and continued in possession under a verbal arrangement afterward. He was to pay taxes, and did so for five years (1867 to 1871), and handed over to Rector the tax receipts, which he files in the name of J. S. Hoffman for part of the time, and of Imperial and Kanawha Oil Company for part of the time.

O. M. Bushong is a son of Daniel, and was living with his father on the land when he married the plaintiff, Elizabeth Bushong, and he states that he and his wife lived there from 1869. He states that Daniel turned over possessions to his wife and himself in 1870, in consideration that they were to support Daniel and his wife. Elizabeth Bushong in one deposition states that she had been in possession since 1870, and when asked who put her in possession, answered that Daniel Bushong did, under agreement by her to keep him and his wife; and in another deposition she stated that Peter Curry put her in possession, and also that Daniel Bushong put her in possession, in consideration that she would keep him and his wife during life, and that under her agreement she had kept Daniel until his death, and was still keeping his wife. The evidence shows that O. M. Bushong recognized himself as a tenant of Rector, though later he repudiated it to Rector, and then he sued.

Elizabeth Bushong appeals here for relief against the decree of the circuit court.

The plaintiff complains that she is to be turned out of house and home by a writ of possession upon a judgment in ejectment to which she was not a party. Herman on Executions, 530, says: "Under this writ it is the duty of the sheriff to remove all persons from the premises described in the writ, and all goods and property that may be thereon. The plaintiff must be put into full and complete possession of the premises." Properly understood, this is good law, but we must not be misled by its generality. The writ is only to execute the judgment, and can go no further than the judgment; and this statement must be taken subject to the general rule that a judgment does not bind strangers to it.

Freeman on Executions, sec. 475, lays down the law thus: "The defendant and all the members of his family, together with his servants, employees, and his tenants at sufferance, may be removed from the premises in executing a writ of possession. It has even been held that the defendant's wife must be removed, although she was not a party to the suit, and claimed the premises as her separate estate. Notwithstanding this decision, we doubt whether a wife, or any other member of the defendant's family not a party to the suit, can lawfully be dispossessed of his or her separate estate, unless possession was acquired by them after the institution of the action. No person in possession of the premises, claiming title thereto at the commencement of the action, can be dispossessed, unless he was made a party to the suit so as to be bound by the judgment; nor can the tenants or agents of such person be lawfully removed, although their entry was subsequent to the institution of the action. On the other hand, all persons acquiring possession from and under the defendant or defendants, during the pendency of the action, whether as vendees, lessees, or otherwise, are bound by the judgment, and should be removed under the writ. Persons acquiring possession of the defendant prior to the suit cannot be dispossessed, unless they were made parties defendant. All persons entering upon the possession of the property *pendente lite* are presumed to have entered under the defendant, and *prima facie* are liable to be turned out by the writ. It is obvious that the temptation to render the plaintiff's action fruitless, by turning over the possession to one not a party to the suit, is very great. All courts will exercise great caution

in considering the right of a person to retain possession after the judgment, when it is clear that he entered *pendente lite*. His right will always be denied, unless it is clear that he did not enter under the defendant, nor by any collusion with him. Mere tricks and devices to rob the plaintiff of the result of his litigation will not be encouraged. But if it clearly appears that any person has entered subsequently to the institution of the writ, not under the defendant, but in his own right, claiming adversely to the defendant, then the officer cannot lawfully dispossess such person."

The Code of 1887, c. 90, sec. 35, provides that a judgment in ejectment "shall be conclusive as to the right of possession established in such action upon the party against whom it is rendered, and against all persons claiming from, through, or under such party, by title accruing after the commencement of such action." It does not affect persons not parties, claiming by title existing before the action, nor any one not claiming by, through, or under the defendant, a stranger in title to the defendant in the action. Law and reason and justice declare this. And a wife is, as to her separate estate, a stranger to her husband,—a wholly distinct person. Our statute giving her capacity to take and hold property as her separate estate as if she were a single woman has, as to such property, dissolved the unity of person of man and wife which existed at the common law: Code, c. 66, sec. 6.

Now, suppose Elizabeth Bushong to be in possession under a contract with Daniel Bushong. That contract, though with the defendant, was made long before the commencement of the action, and, under the law above cited, her right to possession under it could not be affected by the action. Then, suppose her in possession under her deed from Curry. Her title under it was both before the commencement of the action, and not under the defendant, but by a distinct claim, and it could not be affected by the action. Before the suit, she was living on the land with her deed in her pocket conferring a separate estate or claim thereto; and the fact that she was living with her husband, though he were Rector's tenant, would not render her any the less in the possession for the purposes of this case; her possession was sufficiently actual to protect her from ouster by the writ. If a son had had a title to the land distinct from his father, could he have been thrown out under the judgment to which he was no party?

No more could the wife; for as to her separate estate, she is just as distinct a person as the son.

The Pennsylvania case, *Johnson v. Fullerton*, 44 Pa. St. 466, criticised above by Freeman, is not supported by other cases, and is illogical in view of the entire separation of the wife from the husband as to separate estate. Before binding her by a judgment, she ought to have an opportunity to defend her property, and be given a day in court, and ought not to be precluded on the ground taken by the Pennsylvania case, that her husband should have defended on her right. And it is not consonant with the principles stated by Judge Woods in *Hughes v. Mount*, 23 W. Va. 130, which, I think, substantially rule this case. In that case Mount and his wife lived on the land, he as tenant of Hughes and Murphy, she having deeds from other parties. Hughes and Murphy recovered against the husband a judgment in unlawful detainer, and under a writ of possession in it turned husband and wife out. She, finding no one in the house, re-entered into possession, and was sued in unlawful entry and detainer. Judge Woods says that the position of the plaintiffs assumed that the wife re-entered unlawfully and forcibly, and that before the writ was executed, possession was not in the defendant, but in her husband, and that by executing the writ against him, the possession of the wife, if any she had, was divested and transferred to the plaintiff. This assumption he did not sustain. He said the questions whether she had a separate estate and was entitled to the possession were questions to be considered (in the second action of unlawful entry, as I understand it) in determining whether the writ, and all proceedings under it, were not, as to her, mere nullities, and whether the act of dispossessing her husband was not, as to her, mere lawlessness, not depriving her of her right to reclaim her property by the right of lawful re-entry.

He further said: "If, as the defendant claims, it be true that the land belonged to her in fee-simple as her separate estate, then said B. F. Mount had no interest therein, and the plaintiffs by the deed from Commissioner Sands acquired no title thereto. If said land, at the time of said sale under said decree to plaintiffs, so belonged to defendant, B. F. Mount could neither sell nor lease the same, or do any other act to deprive her of the possession and enjoyment of said land without her consent. If, under such circumstances, her husband undertook to lease her land from a stranger, he could acquire

no possession by the lease, nor could he, at the expiration of his lease, surrender to his pretended landlord a possession which he has never acquired, nor could the landlord recover from him a possession he never had, and which he never transferred to his tenant. Whether such a state of facts exists or not are questions of title to be determined at the trial. It is true that if a husband should undertake to lease a wife's land from a stranger, that he could not resist his landlord's action, but it will scarcely be contended that the judgment recovered against him could be satisfied out of his wife's land, or that it could confer upon him any right to the possession thereof."

So I hold that whether Mrs. Bushong's title was good or bad, whether it was better or worse than Rector's, whether he or she was entitled to the sole possession, are questions to be tried in a proper proceeding, and her right and her actual possession are not to be dissipated by a writ of possession against another, an absolute nullity as to her, but she is entitled to a day in court to have her rights weighed in the balance of the law and passed on by due process of law by trial and judgment. The law gives her an advantage in an action of ejectment as one in possession, which she can only lose by due legal process. Rector must bring an action against her, she being in possession.

Appellee's counsel urges that the appellant's deed from Curry is trumped up with fraudulent intent as the work of a conspiracy to defeat the plaintiff's action. The answer is, that before the action began she was on the land, by a deed dated, acknowledged, and recorded before the action. If it had been executed after the action began, there might be force in the claim that it was born but to defeat the fruit of the action,—we might consider whether such was its purpose; but I fail to see how we can consider this matter, seeing that her possession and claim, be it good or bad, existed before the action. How can it be said it was originated to defeat an action not in being? I quote at this point Freeman's text: "No person in possession claiming title at the commencement of the action can be dispossessed unless made a party to the suit." If next it be said that the plaintiff's claim was conceived in fraud, to defeat, not the action of Rector, but his title, and to secure the land from one who had no title, Curry (but what his right was does not appear), I respond, that is a question, whatever be the effect of it if true, to be determined

in a suit to which plaintiff and defendant are parties. Therein the rights of the parties may be heard. This is but an injunction obtained by a wife to save her from expulsion from her home under a writ of possession against her husband in an action to which she was not a party, she not being therein simply and only as a wife, but having a claim to the land independent of her husband; and we hold with her on the fact that she was no party to the action, leaving the titles of plaintiff and defendant to be litigated in another proceeding without prejudice from the court's decree in this case.

I do not see that the principle of estoppel urged by appellee, by which a tenant and those claiming under him are hindered from denying the landlord's title, as expounded in *Emerick v. Tavener*, 9 Gratt. 230, 58 Am. Dec. 217, applies to this case. Tavener leased land to Emerick, and afterwards Emerick conveyed a portion to Alton. It was held that in an action by Tavener against Emerick and Alton, not only was Emerick estopped from setting up title against Tavener, until he restored possession or disclaimed to hold as tenant and brought home to Tavener notice of his disclaimer, but further, that Alton, by entering as purchaser from Emerick, became subject to the same relations held by Emerick to Tavener, and neither could set up adverse title. But there Alton entered under a conveyance from the tenant, claimed under him; here Mrs. Bushong claims under, not her husband, but Curry. As far as her claiming under Daniel Bushong is concerned, so far as the evidence shows, the date of his giving her or her and her husband, whichever it be, the possession under agreement to keep Daniel and his wife, was in 1870, and Daniel did not become Rector's tenant till 1874, and her right and possession under Daniel, as it existed before his lease of Rector, would remain so after that lease, and not fall under the principle of *Emerick v. Tavener*, 9 Gratt. 230, 58 Am. Dec. 217, because earlier in date; and her continuing there afterwards could not change the state of things existing before; and the fact that she was on the land as Bushong's wife, living with his father, does not make her a subtenant, or put her in a condition which would forbid her from acquiring from another a hostile title. It would make her a member of his family, and liable to go off under the writ, if she had no separate claim, but it would not establish a relation of landlord and tenant.

The case cited by appellee's counsel, *Higginbotham v. Hig-*

ginbotham, 10 B. Mon. 369, does not apply. Sally Clarke, as the judge there says, merely resided with the defendant by his permission, without any interest in or title to the premises, — a part of his family, — and as such, the writ authorized the sheriff to turn her out.

Mattox v. Helm, 5 Litt. 186, 15 Am. Dec. 64, does not apply, because the parties there in question entered without title under Elliott, the defendant, and the court said they were mere tenants at will under Elliott, having no fixed right or term, and were liable to go out, no matter when they entered. This is consistent with the rule as stated by Freeman, that a writ of possession would turn out mere tenants by sufferance of the defendant in the writ.

Sinclair v. Worthy, 1 Winst. 114, 84 Am. Dec. 357, was a mere refusal of the court to stay a writ of possession on the suggestion that title was in some one else. It does not apply here. That an injunction will lie to enjoin expulsion from one's home under a writ of possession against one not a party to it is, we think, clear: *Goodnough v. Sheppard*, 28 Ill. 81; *Stewart v. Pace*, 30 Ark. 594; Herman on Executions, 615.

The decree of the circuit court is reversed, and the injunction as prayed for in the bill must be perpetuated, with costs to Elizabeth Bushong in both courts, without prejudice from this decree to the parties from asserting any title to the land which they may have in any other suit.

EJECTMENT — EFFECT OF JUDGMENT IN, AGAINST ONE NOT PARTY TO SUIT. — A judgment in ejectment gives the plaintiff no right of entry on land in the possession of a person who is neither a party nor privy to the judgment: *Kercheval v. Ambler*, 7 J. J. Marsh. 626; 23 Am. Dec. 446. See *Ritchie v. Johnson*, 50 Ark. 551.

INJUNCTION TO RESTRAIN DISPOSSESSION. — An injunction will issue to restrain the assignee of a land certificate from disturbing the assignee of a bond for the conveyance of the land in possession: *Cupps v. Irvin*, 2 Blackf. 112; 18 Am. Dec. 136.

LAIDLEY v. SMITH.

[32 WEST VIRGINIA, 387.]

RECEIVER—STATUTE OF LIMITATIONS AGAINST—PLEADING.—When the receiver in a suit in equity is directed to lend out money in his hands, and in lending such money takes a promissory note therefor, payable on demand to himself as receiver, the statute of limitations begins to run against the note from the date of its execution; and when, in a suit on the note, the plea of such statute is interposed, to which plaintiff objects, he must, in order to avail himself of any statutory or other exceptions to take the note out of the operation of the statute, state them in a special replication to the plea.

STATUTE OF LIMITATIONS AGAINST COURT OR RECEIVER.—Neither a court of equity nor a receiver appointed by it is exempt from the operation of the statute of limitations.

APPEAL—WHAT NECESSARY TO.—Where the case is tried by the court, it is not necessary to an appeal to first move to set aside the findings, and when the motion is overruled, to take a bill of exceptions setting forth the facts. It is sufficient if the facts in evidence appear upon the record by the certificate of the court, or otherwise.

Miller and Gallaher, for the plaintiff in error.

J. M. Laidley and W. Mollohan, for the defendant in error.

ENGLISH, J. This was an action of debt brought in the circuit court of Kanawha County by Charles C. Lewis, receiver of said circuit court; the declaration was filed on the first Monday in November, 1885. The action was founded on a promissory note bearing date on the fifth day of January, 1866, which note is in the words and figures following:—

“\$125. On demand, we, or either of us, promise and bind ourselves to pay Levi J. Woodyard, receiver of the circuit court of Kanawha County, one hundred and twenty-five dollars, borrowed money from the chancery cause of Ruffner and Long v. Donally and als., with interest from date until paid. Witness our hands this fifth day of January, in the year 1866.

[Signed]

“ISAAC N. SMITH.

“BENJAMIN H. SMITH.

“Credit May 23, 1868, paid by B. H. Smith, fifty dollars.”

On the twenty-second day of January, 1886, the defendant demurred to the plaintiff's declaration, and plaintiff joined; and the court, having considered said demurrer, overruled the same, and thereupon the defendant pleaded *nil debet* and payment, and tendered a special plea in writing, to wit, the statute of limitations, to which the plaintiff objected, and the court took time to consider thereof, and on the eleventh day of July, 1888, the defendant, B. H. Smith, having departed

this life, and Charles C. Lewis having been appointed the executor of his last will and testament, and having qualified as such, and George S. Laidley having been appointed as special receiver in the case of Ruffner and Long v. Donally et al., in the place of said Charles C. Lewis, general receiver, to prosecute the suit at bar, and to collect the fund in litigation in this cause, the suit was revived in the name of said George S. Laidley as such special receiver therein, and by consent the same was revived against said Charles C. Lewis as executor of said B. H. Smith, deceased, as defendant therein, and the objection to the plea of the statute of limitations tendered by B. H. Smith in his lifetime, having been argued and considered by the court, was overruled, and said plea was ordered to be filed, and the plaintiff replied generally thereto, and the action was submitted to the court in lieu of a jury; and the court, having heard the evidence and arguments of counsel, found the issues therein for the plaintiff, and gave judgment for the plaintiff for the sum of \$205.01, with interest thereon from the eleventh day of July, 1888, and costs, to which ruling and judgment of the court the defendant tendered a bill of exceptions, which was signed, sealed, and saved to him; which bill of exceptions shows that upon the trial of said action the plaintiff, to support the issue on his part, gave in evidence said note, executed as aforesaid by B. H. and I. N. Smith; also a decree of the circuit court of Kanawha County dated June 16, 1865, made in the case of Ruffner and Long v. Donally and others, directing the receiver to lend out said money on good security; also the order entered in said chancery cause on the 10th of April, 1884, directing C. C. Lewis, general receiver, to collect all the money due to the credit of said suit, and if necessary, to institute legal proceedings for that purpose; also an order of said court made June 2, 1877, appointing Charles C. Lewis general receiver in lieu of Levi J. Woodyard, deceased, showing his qualification, and also directing the executor of said Woodyard to turn over all moneys, bonds, and securities in his hands, both as general and special receiver, to the new receiver; and directing said new receiver to do and perform such duties with regard to the funds and securities which may come into his hands, as the said Woodyard was required by any decree or order of the court to do and perform, or such as he was required by law to do and perform; also another decree in said chancery suit of Ruffner and Long v. Donally et

al., appointing G. S. Laidley special receiver, and directing him to collect said funds, and pay over the same to the parties entitled thereto, — which was all the evidence heard upon the trial of the cause for either party.

The note on which this suit was predicated bears date on the fifth day of January, 1866, and the declaration seems to have been filed on the first Monday in November, 1885. The writ is not made part of the record, but it is presumed it bore date more than ninety days before the filing of the declaration. The suit then was instituted nearly twenty years after the note was executed. The plea of the statute of limitations was interposed; and one of the questions, perhaps the most important question in the case, is, whether said plea should have been sustained by the court. Under the statute which was in force at the time of the execution of said note, every action to recover money, which was founded on any contract in writing signed by the party to be charged thereby or by his agent, but not under seal, should be brought within five years next after the right to bring the same shall have first accrued. When did the right of action accrue in this case? The note was made payable "on demand," and it is contended that the words "on demand" are not employed as a matter of course or idle form, but they were employed to carry out the order of the court as to the disposition of the fund, the money being money in the hands of the receiver, which he was directed to loan out; and it appears from the decree directing said loan that the receiver was directed to loan out said money on good security, to be subject to the order of the court. This would make the loan a loan on call, if the parties executing said note had full notice of said order, which the court would presume they had. The contract for said loan was made with the receiver, who was merely the agent of the court, and acting for the court in lending the money.

When did the court have a right to institute suit upon said note? After it had been executed and delivered to the receiver, it was under the control of the court in the hands of its agent. Parsons, in his work on mercantile law, discussing the question when the statute of limitations begins to run, says, on page 248: "And the general rule is, that it begins when the action might have been commenced"; referring to *Odlin v. Greenleaf*, 3 N. H. 270, where it is held: "An action of *assumpsit* is barred by the statute of limitations only in cases where the time limited in the statute has elapsed after

the right of action accrued." Parsons further says: "If a credit is given, this period does not begin until the credit has expired; if a note on time be given, not until the time has expired, including the additional three days of grace; if a bill of exchange be given payable at sight, then the six years begin after presentment and demand; but if a note be payable on demand, or money is payable on demand, then the limitation begins at once": See *Stafford v. Richardson*, 15 Wend. 302; *Hickok v. Hickok*, 13 Barb. 632.

This note being payable on demand, it was optional with the court when it, through its agent, the receiver, should institute suit to collect the same. If the court was excusable in allowing so much time to elapse between the date of the execution of said note and the decree directing the collection of the same by the receiver, it would seem to us that under the practice when the plea of the statute of limitations was interposed, and the plea was objected to by the plaintiff, in addition to said objection he should have filed a special replication setting forth the facts relied on to excuse the delay and avoid the effect of said plea: See Angell on Limitations, p. 315, sec. 292. But no such replication was filed, and none of the exceptions contained in the statute were relied upon by any such pleading to show that said plea did not apply or was qualified in any manner. It is, however, contended here in argument that the statute of limitations cannot be pleaded against the court; that in this respect the court is like the state, and the old maxim, *Nullum tempus occurrit regi*, applies. Our statute (Warth's Code, p. 262, sec. 20), however, provides that "every statute of limitation, unless otherwise expressly provided, shall apply to the state." The courts came into existence by virtue of the constitution and the laws which confer and define their powers, and in the same category is found a municipal corporation or a county. They derive their powers under the law.

This court held in the case of *City of Wheeling v. Campbell*, 12 W. Va. 53, that the statute of limitations runs against a county or other municipal corporation. See also *Western Lunatic Asylum v. Miller*, 29 W. Va. 327, 6 Am. St. Rep. 644, in which it is held (page 329) that "public corporations, whether they are municipal or mere agencies of the state, are all more or less branches of the government, and necessarily clothed with attributes and incidents of sovereignty; yet when they are clothed with the capacity to sue and be sued,

to have a common seal, to take and hold property, and transact business, they are governed by the same laws, rules, and regulations, and subject to the same limitations, that natural persons are, except so far as they may be exempted or relieved by positive law": Angell on Limitations, p. 202, sec. 194. Chief Justice Marshall, in the case of *McIver v. Ragan*, 2 Wheat. 29, speaking of the application of the statute of limitations, says: "Wherever the situation of a party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception. It would be going far for this court to add to those exceptions. It is admitted that the case of the plaintiffs is not within them, but it is contended to be within the same equity with those which have been taken out of the statute, as where the courts of the country are closed so that no suits can be instituted."

Our statute excepts neither courts nor their agent, the receiver, from the operation of said statute, and although it seems necessary that a receiver should apply to the court for power to collect sums invested by him as such, yet it is really the court bringing the suit through its agent, the receiver; and if the receiver or those interested in the fund so loaned or invested by him have slept upon their rights unreasonably, and have neglected to make application to the court for leave to sue for such a length of time that the demand may be fairly regarded as stale, it would seem to furnish ample ground for a refusal by the court of the necessary leave to use its process to enforce the claim.

I am therefore of opinion that as the receiver, to whom this note was made payable, or those interested in the chancery cause of *Ruffner and Long v. Donally et al.* might have obtained leave of the court to bring suit upon said note by mere motion at any time, in failing to do so they fall into the same category as any other suitor who neglects to invoke the aid of the court in the assertion and prosecution of his claims, and that said suit was delayed too long, and the claim upon which it was predicated was barred at the time said suit was instituted.

It is contended, in argument, that unless motion is made for a new trial, and when said motion is overruled a bill of exceptions is taken, setting out the facts, no appeal can be granted. In the case, however, of *State v. Miller*, 26 W. Va. 106, this court held: "While it is the usual practice where a

jury is waived, and the case submitted to the court in lieu of a jury, if the party against whom the judgment is rendered is dissatisfied therewith, to except to the judgment, and have the court certify the facts proved, yet it is not necessary for the record to show that the judgment was excepted to; it is sufficient if the fact appear upon the record, either by the certificate of the court or otherwise." Under this ruling, then, where the case is tried by the court, it is not necessary to move to set aside the finding of the court, and upon said motion being overruled to take a bill of exceptions setting forth the facts proved; it is sufficient, as in this case, if the facts in evidence appear upon the record by the certificate of the court or otherwise.

The judgment of the circuit court must be reversed; and this court proceeding to enter such judgment as the court below should have entered, it is ordered that the plaintiff's action be dismissed.

LIMITATION OF ACTIONS — DEMAND NOTE — WHEN STATUTE BEGINS TO RUN. — When a note is made payable on demand, the statute begins to run from the date of its execution: *Kraft v. Thomas*, 123 Ind. 513; 18 Am. St. Rep. 345, and note; *Mills v. Davis*, 113 N. Y. 243; *Sanford v. Lancaster*, 81 Me. 434.

STATE v. TINGLER.

[32 WEST VIRGINIA, 546.]

CERTIORARI, WHEN WILL LIE. — *Certiorari* will lie to bring up the true record as it in fact exists and as already made by the court below, no matter what the character of the defect in the transcript as certified on appeal in the first instance. *Certiorari*, however, will not lie to cause a record to be made or corrected. That must be done in the court below.

FORGERY — INDICTMENT. — An indictment for forgery, or for uttering or attempting to utter as true any forged instrument, need not, under the statute, name the person intended to be defrauded, nor allege that the act was to the prejudice of another's right, but it must show that the instrument itself is of such character as to prejudice such right.

FORGERY — EVIDENCE TO SUPPORT CONVICTION. — When the forged instrument is found in the hands of the accused in the county where he uttered or attempted to employ it as true, and this fact appears in proof, while it does not appear that the forgery was committed in another county, the evidence will support a verdict that the forgery was committed in the former county.

B. F. Ayres, for the plaintiff in error.

Alfred Caldwell, attorney-general, for the state.

BRANNON, J. Writ of error to a judgment of the circuit court of Ritchie County, sentencing Tingler to confinement in the penitentiary for two years. A preliminary question arises upon a motion by defendant to dismiss a writ of *certiorari* awarded in this cause. The transcript of the record accompanying the petition for the writ of error states that the grand jury presented "an indictment against Thomas Tingler for a misdemeanor. A true bill." The attorney-general suggested a diminution of the record, and this court awarded a writ of *certiorari* to the clerk of the circuit court of Ritchie, and the record as certified by him under the mandate of said writ shows that the grand jury presented "an indictment against Thomas Tingler for a felony. A true bill." The defendant below moves this court to quash this writ of *certiorari*. His counsel cites the provision in section 7, chapter 135, Code of 1887, that "such court may in any case award a writ of *certiorari* to the clerk of the court below, and have brought before it, when part of a record is omitted, the whole or any part of such record."

Certiorari, as an auxiliary writ used by appellate courts to present to them for decision of errors assigned the record in the court below, as it in truth exists there, is a remedial writ belonging to such courts under the common law without this statute, and its office should not be hampered by too strict construction. If counsel means by citing the statute that it does not lie in this case, because the statute gives it "when part of the record" is omitted, and because the transcript, as it first appeared, showed the indictment to be for a misdemeanor, and was full on this point, I do not think the point well made. The attorney-general suggested that this word "misdemeanor" in the transcript was a clerical error, and that in the record-book it was in truth "felony," not "misdemeanor." Literally, if such is the fact, here is a part of the record omitted in the language of the statute, — the word "felony," — and the statute would apply. Certainly, where the clerk, by accident in making the copy, substitutes one word for another found in the record, the spirit and object as well as the letter of this act, as well as the common-law function of the writ, would seem to afford a remedy whereby the record, as in truth it is, can be brought to this court a better record. In *Shifflet v. Commonwealth*, 14 Gratt. 652, where there appeared an omission in the transcript of the finding of the

indictment, a *certiorari* was held proper to secure a better record. So in *State v. Williams*, 14 W. Va. 869.

If a record is defective or incorrect, the errors or omissions should be suggested in this court, and a *certiorari* moved to bring up a correct record: *Hudgins v. Kemp*, 18 How. 530. "Where the clerk's certificate to the transcript is in point of fact not true, the remedy is by *certiorari* to supply deficiencies," says Waite, C. J., in *Missouri etc. R'y Co. v. Dinsmore*, 108 U. S. 30. In short, this writ is properly used by this court to get before it the record of the court below as it in fact exists, no matter what the character of the defect in the transcript as certified in the first instance here.

Defendant's counsel relies on *Seibright v. State*, 2 W. Va. 591, which holds that the purpose of the writ is, not to cause a record to be made or corrected, but to have brought before the appellate court, when part of the record is omitted, the whole or any part of it. That case does not apply here. There, after signing the bill of exceptions, the judge during the term had interpolated certain words, and the defendant asked a *certiorari* with the intent to have the bill certified, as it was before the interpolation of those words, and, the facts being agreed, this court held that the court below had the right to insert those words; and the real point of the decision was, that the record as already before the court was correct and true, and refused the writ. Judge Maxwell remarked that a *certiorari* could not be used to cause a record to be made or corrected. This is so. Its office is only to bring up the record as already made by the court below. Any amendment or correction of that record is to be made by that court in a proper proceeding: *State v. Vest*, 21 W. Va. 796; *Bias v. Floyd*, 7 Leigh, 647. A *certiorari* will not do this. But in this case the state by the *certiorari* is not seeking to alter, amend, or correct the record from its present showing, as it now is in the circuit court, but simply to present it here as it is there. The motion to quash the *certiorari* is overruled.

The indictment is as follows: —

"State of West Virginia, Ritchie County, to wit.

"The grand jurors of the state of West Virginia, in and for the body of the county of Ritchie, and not attending said court, upon their oaths present that Thomas Tingler, on the — day of —, 1888, in said county, feloniously did forge a certain paper writing, purporting to be an order signed by — MacFadden, and to solicit Mr. Collins to let the bearer

have three dollars' worth of goods, and which said forged order is of the following purport and effect, to wit: —

“‘Feb. the 23, 1888.

“‘MR. COLLINS, — Please let the bearer have three dollars' worth of goods, and oblige me. I will pay you in tobacco.

“‘MACFADDEN.’

With intent to defraud, against the peace and dignity of the state.

“*Second count.* And the jurors aforesaid, on their oaths aforesaid, do further present that the said Thomas Tingler afterwards, to wit, on the — day of —, 1888, in said county, feloniously did utter and attempt to employ as true a certain paper writing, purporting to be an order payable to bearer, which said last-mentioned order is of the following purport and effect, that is to say: —

“‘Feb. the 23, 1888.

“‘MR. COLLINS, — Please let the bearer have three dollars' worth of goods, and oblige me. I will pay you in tobacco.

“‘MACFADDEN.’

With intent to defraud; he, the said Thomas Tingler, at the time he so uttered and attempted to employ as true the said last-mentioned forged order and paper writing, to wit, on the day and year last aforesaid, well knowing the same to be forged, against the peace and dignity of the state. On information of Creed Collins and William MacFadden, sworn and sent to the grand jury to give evidence at the instance of the state.

H. PECK, Pros. Att’y.

[Indorsed] “A true bill. J. M. MACKINNEY, Foreman.”

Defendant moved the court to quash the indictment and each count, and his motion was overruled. He then pleaded not guilty, and was tried by a jury, and a general verdict of guilty as charged in the indictment was rendered. He moved the court to arrest judgment and grant him a new trial, because the verdict was contrary to law and evidence. The court overruled the motion and pronounced the said sentence, and he excepted.

The bill of exceptions shows that the state proved by Creed Collins that the order was presented to him at his store in Ritchie County by the prisoner about the time of its date, who said that his name was Thomas Campbell, and that the order presented signed “MacFadden” was given to him by William MacFadden for work; that Collins gave prisoner

three dollars in goods for the order, and charged them to MacFadden, who afterwards refused to pay the same because he had not given the order, and that he (Collins) had lost the amount of the order, three dollars.

The state introduced the order set out in the indictment, and proved by William MacFadden that the name of the prisoner was Thomas Tingler; that he, MacFadden, was not indebted to Tingler at the time when the order bears date; that he did not write or sign the name "MacFadden" thereto, and did not authorize any one to do so, nor did he ever recognize it as good, but refused to pay it to Collins, and Collins lost three dollars thereon. MacFadden, on cross-examination, stated that since he first had knowledge of the existence of the order, he had said, if prisoner had paid him one hundred dollars he would not have prosecuted him; that he meant by that that he would have avoided going before the grand jury. He said he was the only William MacFadden in Ritchie County.

The state proved by Hallam that prisoner had been in his custody as jailer upon this charge; that he was not kept locked in the cell, but was permitted to be at large in the room containing the cells or cages; that the door of the room was not locked, but propped with an iron poker from the outside; that prisoner pried one of the hinges of the door loose and escaped, and was gone three months. A reward was offered, and he was captured by a man named Frey. An account was shown witness in his favor against the state, sworn to by him, for criminal charges, charging for receiving and discharging this prisoner at date of escape, and he admitted swearing to the account, stating that he was mistaken, and should have charged only for receiving the prisoner.

Treating, as we must, the record of the finding of the indictment as correctly shown by the record sent up by the clerk under the *certiorari*, there is nothing to sustain the motions to quash and in arrest of judgment, so far as they rest on that point.

Is the indictment good in both counts? We think it is. The prisoner's counsel argues that the second count is bad because it does not specify the person to be defrauded. The counsel admits that the first count, though it does not name such person, and though bad at common law, is good under the Code of 1887, c. 158. sec. 8, providing that "where an intent to injure, defraud, or cheat is required to constitute an

offense, it shall be sufficient in an indictment or accusation therefor to allege generally an intent to injure, defraud, and cheat without naming the person intended to be injured, defrauded, or cheated"; but contends that the second count, that for uttering, is not helped by this statute. We do not concur in this view. We think that such intent exists in the uttering and employing as true a forged instrument, knowing it to be forged, as much as in the act of forging it. In *State v. Henderson*, 29 W. Va. 147, the count for uttering did not charge whom it was intended to defraud, though it did charge to the prejudice of Leonard, and it was held good. So in *State v. Koontz*, 31 W. Va. 127, the indictment was held good, though it did not name the person to be defrauded. This indictment is in the form found in Mayo's Guide, which has for many years been used in both Virginias.

In assigning errors, the prisoner's counsel points out as a defect in the indictment that it does not allege that the act was to the prejudice of any one's right. *Powell v. Commonwealth*, 11 Gratt. 822, is a full answer to this point. There it was held that the words "to the prejudice of another's right," found in the statute against forgery, need not be used in the indictment, because they are descriptive, not of the offense, but of the instrument. Having specified various instruments as subjects of forgery, it being impossible to specify all, section 7 provides: "If a person forge any writing other than such as is mentioned in the first and third sections of this chapter, to the prejudice of another's right," — plainly intending by these words to describe or characterize the writing, not the act. If the instrument itself be of such character as may prejudice another's right, that is enough. There is no error, therefore, in overruling the motion to quash and in arrest of judgment.

Was there error in refusing a new trial? Prisoner's counsel urges that the evidence does not show that the forgery was committed in Ritchie County. The prisoner in Ritchie County has the order in his possession, and passes it about the date of the order. If he forged it, why may it not be said that he forged it there? In *State v. Poindexter*, 23 W. Va. 805, this court held that on a trial for forgery, if it be proved that the writing was found in the hands of the prisoner in the county where he uttered or attempted to employ it as true, and there is no evidence that the forgery was done in another county, the jury may infer from these facts that the forgery was committed in that county. In *Spencer v. Commonwealth*, 2 Leigh,

751, the court held that evidence that the prisoner had the note in his possession in a county was proper evidence to go before the jury of the fact that he committed the forgery there: See 3 Greenl. Ev., sec. 112. The jury having found against the prisoner as to this point, it being the judge of the weight of the evidence, this court cannot find otherwise, unless we consider the evidence manifestly insufficient. But the verdict, it may be added as pertinent to this point, is general. It finds the prisoner guilty of uttering and employing the order as true as much as it finds him guilty of forgery, and this certainly occurred in Ritchie. This consideration would render the question of the place of the forgery immaterial, even if there were anything of substance in it.

We are of opinion that the evidence justifies the verdict. Judgment is to be affirmed.

CERTIORARI — WHEN WILL LIE. — *Certiorari* to obtain a complete transcript is granted upon either party's suggesting a diminution of the record, and it may issue as often as it is made to appear that the record is imperfect, until a perfect transcript is obtained: *State v. Reid*, 1 Dev. & B. 377; 28 Am. Dec. 572, and note.

FORGERY — SUFFICIENCY OF INDICTMENT. — It is not necessary in charging forgery to designate the person or corporation sought to be defrauded: *State v. Cross*, 101 N. C. 770; 9 Am. St. Rep. 53, and note; *People v. Van Alstine*, 57 Mich. 69.

CORROTHERS v. JOLLIFFE.

[32 WEST VIRGINIA, 562.]

PARTITION OF PROPERTY NOT SUSCEPTIBLE OF DIVISION. — When partition in kind cannot be conveniently made, the court may either allot the entire subject-matter to the tenant offering the largest sum for the whole, or may order the sale of the whole, and a distribution of the proceeds among the tenants. The court cannot, however, allot the whole to a tenant who is able, but unwilling, to pay to the other tenants as much or more proportionally for their interests as they are willing and able to pay him for his interest; nor can it compel one tenant to accept for his interest less than he is willing and able to pay for the like interests of the other tenants.

J. W. Mason and A. F. Haymond, for the appellant.

SNYDER, P. Suit in equity commenced in December, 1882, in the circuit court of Monongalia County by John W. Corrothers against Thomas M. Jolliffe and others, and subsequently removed to the circuit court of Taylor County, where it was finally heard and decided. The facts as they appear

in the record, so far as it is necessary to state them for the purposes of this appeal, are as follows: —

Prior to July, 1882, six of the children of Joseph Jolliffe, deceased, were the joint owners of certain real estate in Monongalia County, consisting of about twenty-one acres of land, on which there were a mill and other buildings, with certain water rights appurtenant thereto. One of these six children was the defendant, Thomas M. Jolliffe, and another was his sister, Catherine A. Hutchinson, who, in July, 1882, sold and conveyed her undivided one-sixth interest in said property to the plaintiff, John W. Corrothers. In December, 1882, the defendant, Thomas M. Jolliffe, purchased and had conveyed to him the interests of four of said children, whereby he became the owner of the five sixths, and the plaintiff the owner of the other one sixth, of said property. The bill alleges, and the answer admits, that the property is not susceptible of partition in kind. The bill prayed for a sale of the property, and a division of the proceeds according to the respective interests of the parties. The defendant, Thomas M. Jolliffe, states in his answer that he does not wish to sell his five sixths interest in the property, and avers and offers to pay the plaintiff for his one-sixth interest whatever sum three disinterested men will say it is worth, or whatever the court, by reference to a commissioner, may ascertain to be the value of the plaintiff's one-sixth interest. In reply to this claim and offer of the defendant, the plaintiff stated that he also wished to buy the property, and was willing to pay the said defendant the fair value of his five sixths, to be ascertained as suggested by the defendant, and denies that because the defendant is the owner of the larger interest, he has the right to purchase the property, to the exclusion of the right of the plaintiff to purchase.

Upon this state of facts, the court made an order, in which it decided that the defendant was entitled to purchase the one-sixth interest of the plaintiff, and referred the cause to a commissioner to ascertain the value of said one-sixth interest. The commissioner took depositions as to the condition and value of the property, and reported that the value of the plaintiff's one sixth was \$583, and he also returned with his report the offers of two responsible persons to pay \$1,100 and \$1,150 respectively for said one-sixth interest. On exceptions by the plaintiff, the cause was referred to another commissioner, and he reported that the said one-sixth interest was worth

\$550. Upon the final hearing of the cause, the plaintiff repeated an offer previously made by him to pay the defendant \$4,166.69 for his five-sixths interest in the property, and brought said sum into court and tendered it for such payment; but the court refused to consider said offer, and decreed that the defendant pay to the plaintiff \$550 in full satisfaction of his one-sixth interest, and in consideration thereof ordered the plaintiff to convey said interest in the property to the said defendant.

From this decree, which was entered on August 11, 1886, the plaintiff has appealed.

Our statute declares: "When partition cannot be conveniently made, the entire subject may be allotted to any party who will accept it and pay therefor to the other parties such sums of money as their interest therein may entitle them to; or in any case in which partition cannot be conveniently made, . . . the court may order a sale of the entire subject, and make distribution of the proceeds of sale according to the respective rights of those entitled," etc.: Code 1887, c. 79, sec. 3. Under this provision of the statute, when partition in kind cannot be conveniently made, the court may do either of two things: 1. It may allot the entire subject to a party who will accept it; or 2. It may order the whole subject to be sold; but whether the court should, in any particular case, adopt one or the other of these modes of proceeding must depend upon the circumstances of the case. In a case such as the one now before us, where there are but two parties, and each of them desires to have allotted to him the whole subject, the court cannot arbitrarily decide that one shall have the subject, to the exclusion of the other.

The fact that one has a greater interest than the other is surely no just reason why he should be given a right of election which is denied to the other. In principle, the owner of the small interest has as much right to control and protect his interest as the owner of the large interest has to control and protect his interest. The difference between the two interests is merely one of degree, and not of principle. The small interest of the one may be a much larger proportion of his whole estate than the large interest is to the whole estate of the owner of that interest. A man who owns one acre of land is, in law and justice, entitled to the same rights in respect to it that a man who owns one hundred acres is in respect to his one hundred acres. The language of the statute

is, not that the owner of the larger interest may elect to have allotted to him the whole subject, upon the payment to the owner of the smaller interest the value of the latter, but that the entire subject may be allotted to any party, regardless of his interest, who will accept it. In a case where more than one party, as in the case at bar, asks the court to allot the whole subject to him, and he is able and willing to pay for the other interests, both reason and justice require the court, in the exercise of its powers, to allot the whole to the party who offers the largest proportional sum for the whole or the interests of other parties. It would be unjust, in such cases, to allot the whole to the party who was unwilling to pay to the other party or parties as much or more proportionally for their interests as they were willing and able to pay him for his interest, and it would be equally unjust for the court to compel a party to accept for his interest less than he was ready and willing to pay for the like interests of the other parties. In such case the only proper mode of proceeding is for the court either to allot the entire subject to the party who offers the largest proportional price for it, or to order the sale of the whole.

If, however, only one of the parties is willing to have the whole allotted to him, and the other parties are unwilling to take for their interests what such party is willing to pay therefor, then the court may either refer the matter to a commissioner to ascertain the fair value to be paid for said interests, or order the whole subject to be sold, as the one or the other course may seem to the court to be the most advisable and promotive of the interests of all the parties in interest.

In the case at bar, the plaintiff offered to pay the defendant \$4,166.67 for his five sixths of the property. This was equivalent to an offer of \$833.33 for a one-sixth interest, and in the face of this offer the court decreed that the plaintiff should have only \$550 for his one-sixth interest. The effect of this decree was to confiscate at least \$283.33 of the plaintiff's property, or to transfer it to the defendant arbitrarily and without compensation. But this was not all. The plaintiff was offered a much larger sum than \$833.33 for his interest, and stated that he expected to pay the defendant more than that sum for each of the defendant's sixth interests in the event the entire property should be sold at public auction.

In view of these and other facts appearing in the record, it was the plain duty of the court to order the entire subject to be sold at auction. For these reasons, I am of opinion that all the decrees of the circuit court should be reversed, and the cause remanded to said court, to be there proceeded in according to the principles announced in this opinion.

PARTITION OF PROPERTY NOT SUSCEPTIBLE OF DIVISION. — Where the property is not susceptible of division, or a division would be manifestly injurious to the interests of the co-tenants, the court should decree a sale of the whole property: *Dall v. Confidence etc. Mining Co.*, 3 Nev. 531; 93 Am. Dec. 419, and note; note to *Laurissini v. Corquette*, 57 Am. Dec. 200; *Blake-more v. Blakemore*, 39 La. Ann. 804; *Brendel v. Klopp*, 69 Md. 1; *Coffin v. Argo*, 134 Ill. 276.

ALDERSON *v.* COMMISSIONERS.

[32 WEST VIRGINIA, 640.]

ELECTIONS — INJUNCTION — JURISDICTION. — An injunction will not issue to restrain county commissioners or other proper officers from certifying to the governor the result of their canvass of the county vote for a representative in Congress.

APPEAL — WHAT REVIEWED ON — CONTEMPT. — An appeal from a decree in equity will not bring up for review an order discharging a rule to show cause why punishment should not be inflicted for disobeying an injunction granted in the suit. Such order can be reviewed only by writ of error.

J. W. St. Clair, Brown and Jackson, and O. Johnson, for the appellant.

A. Burlew and J. A. Hutchinson, for the appellees.

BRANNON, J. John D. Alderson presented to the judge of eighth circuit a bill in equity, stating, in effect, that at the election in this state on November 6, 1888, he received a large number of votes for representative in the Congress of the United States for the third district of this state; that the opposing candidate was James H. MacGinnis, who received a large number of votes for the same position; that the result of the election in each county of said district except Kanawha had been certified to the governor; that either he or MacGinnis had been elected; that the result depended on the ascertainment of the result in Kanawha County; that the defendant commissioners on November 12th met to ascertain the result in said county; that returns as certified from the precincts showed that said Alderson had received 3,329 and

said MacGinnis 4,658 votes; that said Alderson demanded a recount, which recount was made, whereby the result was for said Alderson 3,341 and for said MacGinnis 4,638 votes; that said commissioners refused to accept such recount except as to certain precincts, and as to others adopted the original returns, rejecting the result of the recount there, and entirely rejected the votes cast at two precincts, whereby the result was for said Alderson 3,325 and for said MacGinnis 4,660 votes, which would elect said MacGinnis. The bill states that the said Alderson excepted to this action of the commissioners, and during the progress of the canvass excepted to various rulings and decisions of the commissioners, which are detailed in the bill. The bill also states that the commissioners refused to settle and sign bills of exceptions touching these rulings, and that said Alderson by a proceeding in *mandamus* in this court obtained a mandate from this court requiring them to do so; and that they were bound to make a record of all poll-books, ballots, packages, ballot-boxes, and tally-sheets, tally-sheets on the recount and evidence, and their rulings and actions; and that he had tendered them a bill of exceptions representing the same, but they had not yet settled and signed it; and that, as soon as settled and signed, he would apply to the circuit court of Kanawha for a writ of *certiorari* to correct such erroneous proceedings of said commissioners; that in order that justice might be done, it was important to him that said commissioners should not send to the governor certificates of the result of said election in said county according to their said decision; that it was the intention of the commissioners, as soon as they should sign said bill of exceptions, and before he could have time to apply to said circuit court and obtain a *certiorari* and give bond, to certify said result to the governor according to their erroneous decision, and that they intended so doing for the very purpose of defeating said Alderson's right to review said proceedings; that he had asked said commissioners to consent not to certify said result until he could apply for the *certiorari*, but they declined to say what their intention was; that though they had announced their decision, they were keeping it off the record until the bill of exceptions should be signed, and he charged that they had already made out a certificate ready to file with the governor as soon as the exception should be signed, and their decision entered of record, and that they had prepared it, that there might be as little

delay as possible in filing it with the governor, and that thereby the said Alderson would be defeated in his attempt to review said proceedings. He prayed an injunction to restrain the commissioners from certifying to the governor the result of said election. On December 15, 1888, such injunction was awarded. Said Alderson, on January 4, 1889, filed in court his affidavit, stating that process upon the injunction bill was served on two of the commissioners December 15th, but does not give date of service on the other; that on December 15, 1888, he presented his petition for a *certiorari* to review such proceedings, and it appears it was allowed December 17, 1888, with an order restraining them from certifying said result, and that he believes the said commissioners had full notice thereof; and that notwithstanding such notice and service of process on said injunction, said commissioners did certify such result to the governor; and on said Alderson's motion, a rule was awarded against them to show cause why they should not be punished for their contempt in so violating the injunction. Afterwards the defendants moved the court to quash the said rule for contempt as improvidently awarded and for want of jurisdiction, and the rule was quashed, and defendants discharged therefrom. Afterwards the defendants moved the court to dissolve the injunction, and the same was dissolved for want of jurisdiction, and the bill dismissed.

Said Alderson appealed to this court. He assigns that the court erred in dissolving the injunction and dismissing the bill, and in discharging the rule for contempt.

The defendants contend that there was no jurisdiction in the circuit court to entertain the injunction, and that it properly dissolved it and dismissed the bill. No principle of the law of injunction is better settled than that injunction does not lie to determine questions of appointment to public office and the title thereto, as they are of purely legal nature, and cognizable only in courts of law: 2 High on Injunctions, sec. 1312; High on Extraordinary Legal Remedies, sec. 619; *Kilpatrick v. Smith*, 77 Va. 347; Judge Green's opinion and authorities cited in *Dryden v. Swinburn*, 15 W. Va. 234. This is not, however, a proceeding to try title to an office, but to restrain county commissioners from sending to the governor the result of their count of the votes for a representative in the United States Congress. Does an injunction lie in such case?

Our statute provides that the commissioners shall ascertain the result of the election in their county and certify it to the governor, who is to ascertain who is elected, and make proclamation thereof. In *Dickey v. Reed*, 78 Ill. 261, it was held that a court of chancery has no power to restrain by injunction a board of canvassers from canvassing the returns of an election, where the law under which the election was held neither in terms nor by implication confers such power, and where there are no facts before the court which require it to take judicial cognizance, and hear and adjudicate and decree; and that, valuable as is the remedy in its proper sphere, it must not be extended to doubtful cases, or to accomplish ends where there are other adequate remedies. The opinion in that case is elaborate and well sustained. I quote some of its passages:—

“If the court may exercise this jurisdiction in cases of doubt, or even where there is no doubt, of the result, a few . . . persons might, and probably would, be induced, from the heat and strife always engendered in such elections, to resort to a bill and injunction, and thus for years thwart the will of the people. . . . Public policy does not require such a jurisdiction, even if it could sanction it. If the power were admitted, where would its jurisdiction end? . . . Sanction the power in this case as inherent in the court of chancery, could any ingenuity suggest reasons which should forbid the application of the same rule to every case we have above supposed, or any election case where fraud is alleged? In this case, alleged fraud is the ground on which the power is urged. So would it be in those cases, and the fraud would be precisely the same in each.”

In *Peck v. Weddell*, 17 Ohio St. 271, it was held that fraud in election could not justify injunction. In *Thompson v. Ewing*, 1 Brewst. 67, it is held that equity cannot restrain a prothonotary from certifying election returns to the board of return judges, though the returns are admitted to be forgeries. 6 Am. & Eng. Ency. of Law, tit. Elections, p. 390, states the law thus: “A court of equity will not interfere by an injunction to prevent the election officers or canvassing officers from doing their duty as required by the law, nor prevent them from canvassing votes in a certain way.”

I think the case of *Fleming v. Guthrie*, 32 W. Va, 1, *ante*, p. 792, contains principles of law kindred to, if not binding as authority in, this case. Judge Fleming, who was a candi-

date for governor at the same election, obtained an injunction restraining the secretary of state from laying before the legislature the certificate of the commissioners of the county court of Kanawha County of the result of the election as to governor, and afterwards General Goff, who was also a candidate for governor, obtained from the circuit court of Kanawha a *mandamus* to compel the secretary of state to do what he had been so enjoined from doing. The circuit court announced that it would disregard and ignore such injunction. The bill of injunction alleged that Fleming had before that obtained from said circuit court a *certiorari* to correct the action of the commissioners in canvassing the vote for governor, and that said *certiorari* was yet pending; but that said commissioners had transmitted said certificate of returns to secretary of state before said *certiorari* issued. Fleming asked a writ of prohibition from this court to prohibit the circuit court from ignoring said injunction and proceeding with said *mandamus*, which was refused by this court.

Here was an injunction to restrain the sending to the legislature, that it might declare the result as to governor, the returns of Kanawha County, until the pending writ of *certiorari* should accomplish correction of alleged errors and procure correct returns. That injunction might be said to be merely auxiliary and necessary to keep back the returns, so that they could not be made the basis of a declaration of election until correct returns should be had, just as much as in this case; but the court did not think the injunction could be sustained, for want of jurisdiction. In delivering the opinion of the court, Snyder, president of the court, said: —

“In *Walton v. Develing*, 61 Ill. 201, it was held that ‘where the law plainly requires an officer to perform a duty, and he is not exceeding or abusing his powers, but fairly acting within the same, and a court issues a writ to restrain him from its performance, he must discharge his duty as prescribed by the law.’ That case was a proceeding for contempt against election officers for holding an election in disobedience to an order of injunction, and in which the court held that the injunction, having been issued without authority, was void, and that there was no contempt in disobeying it. The court, in its opinion, says: ‘In such case, what must control the officer, — the mandate of the court, or the plain behests of the law? The court, as well as the inferior officer, must be governed by the law. When the law imposes a posi-

tive duty upon a public functionary, and a court commands him not to perform it, he must obey the law, and disobey the writ of the court.' In *Moulton v. Reid*, 54 Ala. 320, it was decided that a court of equity has no jurisdiction to enjoin the person declared elected to a municipal office from using his certificate of election where the law provides for a contest."

This court then held: "A court of equity has no jurisdiction to enjoin the secretary of state from delivering to the speaker of the house of delegates the sealed returns of an election for governor properly transmitted to him; and such injunction, if granted, will be treated as a nullity." And citing in its opinion with approbation the case of *Smith v. Myers*, 109 Ind. 1, 58 Am. Rep. 375, quoted from it as follows: "It is a principle of constitutional law, declared in our constitution, and enforced by many decisions of our own and other courts, that the departments of government are separate and distinct, and that the officers of one department shall not invade any other. To interfere by injunction in this case would involve a violation of this fundamental principle, as a conflict between two great departments of the government would result from an exercise of the jurisdiction invoked by the appellant."

Why do not these principles substantially apply to the case in hand? The injunction here involved was an act of the judicial department, tending in its consequences to prevent the governor, the chief of the executive department, from performing an important function assigned to him by law, — that of declaring an election of a member of Congress. Through these commissioners the popular will in elections for all offices, national and state, from president and governor down, as expressed in the several counties, is ascertained and certified to the power which declares the election result. For representative in Congress, the vote is certified by them to the highest state officer, — the governor, — in order that he may ascertain and declare the result. This duty is of the most vital importance, and should be performed without delay.

Is it possible that injunction lies to tie up, even temporarily, the performance of these functions so necessary to reach the popular verdict, when any candidate may think himself aggrieved, and make it dependent on private litigation? Do not the evils of the exercise of such a jurisdiction at once suggest themselves without specification? Once the

courts allow it, where will it end? How often and where will it be exercised? It may be rather asked, When and where will it not be exercised? It would prove a Pandora's box, the evils and ultimate effects of which cannot be readily foreseen. Through the exercise of such a power in the courts by injunction, that which is most sacred in free government—the will of the voters—may be indefinitely delayed in its expression, or practically defeated. These matters are in their nature political, and their decision rests with the political power of the government, and the processes which it has designated for the purpose, not with the judiciary; and the courts should be on their guard lest they overstep the legitimate boundary of their jurisdiction.

This court has, under the clause of the constitution giving circuit courts power to supervise and control all proceedings before justices and other inferior tribunals by *mandamus*, prohibition, and *certiorari*, sustained a jurisdiction by those processes, and in so doing has gone as far as there is warrant, and does not desire to extend the scope of the process of injunction into this field. There is no provision in the constitution expressly authorizing it as to injunction.

But it is argued that this case is an exception to the general rule, and that the injunction in this instance is only auxiliary or ancillary to the proceeding at law by *certiorari*; that but for it the commissioners could and would certify the returns to the governor before the plaintiff could obtain that writ and give bond to consummate it, and thus render the *certiorari* abortive. I do not see that the mere fact that a party has taken exceptions in a law proceeding with intention to appeal to a higher court will warrant an injunction to restrain the judgment. Here the exception was not yet settled or signed; no *certiorari* was pending. Perhaps the intention to obtain it might not be carried out, or the writ might not be obtained. But the position that there was no other remedy does not seem sound. If, upon the *certiorari*, when obtained, the action of the commissioners should be reversed, the judgment might be such as to need no further proceedings before them; or if such further proceedings should be necessary, they could be required to review their work and properly certify the result of the election, as this court has at this term decided in *Alderson v. Commissioners*, 32 W. Va. 454; and beyond this the law affords ample and adequate remedy in the process of a contested election.

Equity disavows jurisdiction by the stringent process of injunction where other adequate remedy exists: High on Injunctions, sec. 28. Equity especially disavows a jurisdiction in matters pertaining to elections. We fail to see in the circumstances of this case that stress of necessity which would make this case an exception to a general rule, which the able and distinguished counsel for the plaintiff frankly admits to exist.

If it be argued that the contemplated hasty action by the commissioners was with fraudulent intent to defeat the purpose of the *certiorari*, the answer is, first, that the law does not impute fraud to public functionaries in the exercise of their lawful jurisdiction: *Bridge Co. v. Town of Point Pleasant*, 32 W. Va. 328; and further, that we do not see how fraud could be imputed to them in doing an act which the law made it their duty to do.

As to the error alleged in discharging the rule for contempt, does this appeal bring up the judgment in this proceeding to this court for review? The proceeding for a contempt is a criminal proceeding in its nature, separate and distinct, upon the return of the rule or appearance thereto by the defendant, from the cause, in a violation of orders in which the contempt consists: *Baltimore etc. R. R. Co. v. Wheeling*, 13 Gratt. 40; *State v. Irwin*, 30 W. Va. 404; *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864. It is to be then entitled in the name of the state at the relation of the party complaining against the offender. It was so entitled in this case. It must be entered in the law order-book, though the contempt was in disobedience of process or orders in chancery, and it is error to fail to enter it in the law order-book: *Ruhl v. Ruhl*, 24 W. Va. 279. It does not appear in what book the order of discharge was entered in this instance. The petition in this case asked an appeal from and *supersedeas* to the two orders in it specified, made the 9th of January, 1889, one being the order discharging the rule, the other dissolving the injunction and dismissing the bill.

What are we to call this proceeding, or what are we to consider it? It cannot be both an appeal and writ of error. I think it is what the record calls it, an appeal in said chancery cause, and that, so far as it applies to the order discharging the rule for contempt, it was improvidently allowed, and that it does not bring up for review the order discharging said rule, because that is separate and distinct from the

chancery proceeding, criminal in its nature, and cannot be brought here by appeal, but only by writ of error. As that order is not therefore reviewable or cognizable in this appeal, we do not consider any question involved in it, whether the said Alderson has such relation to it as to warrant proceedings in his individual name for its review, or whether any contempt was committed.

The decree of the circuit court dissolving the injunction and dismissing the bill is affirmed, with costs and thirty dollars damages to appellees.

INJUNCTION TO RESTRAIN OFFICERS FROM DISCHARGE OF OFFICIAL DUTY:
See note to *Fleming v. Guthrie*, 32 W. Va. 1; ante, p. 792.

GASTON v. MACE.

[33 WEST VIRGINIA, 14.]

WATERCOURSES. — NAVIGABLE STREAMS IN THE UNITED STATES ARE OF THREE CLASSES: 1. Tidal streams, that are held navigable in law, whether navigable or not; 2. Those that, although non-tidal, are yet navigable in fact for boats or lighters, and susceptible of valuable use for commercial purposes; 3. Those streams which, though not navigable for boats or lighters, are floatable, or capable of valuable use in bearing logs or the products of mines, forests, and tillage of the country they traverse to mills and markets.

WATERCOURSES. — THE NAVIGABILITY OF FRESH-WATER NON-TIDAL STREAMS is a question of fact, and the burden of proof must be assumed by him who claims them to be navigable, and he must show that they are in fact navigable for boats or lighters, and susceptible of valuable use for commercial purposes in a natural state, unaided by artificial means or devices, for such length of time during the year as will make them valuable to the public as public highways, though he need not show that they are thus valuable during the entire year.

WATERCOURSES — FLOATABLE STREAMS, RESPECTIVE RIGHTS OF THE LAND-OWNER AND OF THE PUBLIC IN. — While the owner of land through which a floatable stream runs owns the bed as well as the banks thereof, he has no property in the water itself, aside from that which is necessary for the gratification of his natural and ordinary wants, and of having it flow without disturbance or material diminution by any other proprietor. His use of the stream and its waters must be reasonable, and not inconsistent with the reasonable enjoyment of others who have an equal right to its use. The public has the right to use it as a public highway to float lumber and other products to mill and market, and the land-owner has no right to unreasonably incommode and hinder the public use.

WATERCOURSES — FLOATABLE STREAMS, RIGHT TO MAINTAIN MILLS AND DAMS THEREIN. — A land-owner has a right to build a mill, and erect a dam across a stream to accumulate water to run the mill; but the main-

taining of such a dam cannot give him any prescriptive right to prevent the use of the stream as a public highway.

WATERCOURSES — FLOATABLE STREAMS. — THE MAINTENANCE OF A DAM ACROSS a floatable stream, so as to prejudice the right of the public to float logs therein, and without providing suitable sluices to allow the logs to pass around the dam, is a public nuisance.

WATERCOURSES — FLOATABLE STREAMS. — FOR THE DESTRUCTION OF A DAM MAINTAINED ACROSS a floatable stream, by logs placed therein, there can be no recovery, because the land-owner has no right to maintain his dam in such a manner as to interfere with the right of the public to float logs and other products down the stream.

PRESCRIPTION. — LAPSE OF TIME DURING WHICH A DAM HAS BEEN MAINTAINED ACROSS A FLOATABLE STREAM by a riparian proprietor cannot give him any prescriptive right to maintain it as against and to the prejudice of the public, though it might give the right to keep up such dam as against another riparian owner.

ACTION on the case to recover for the destruction of plaintiff's dam across Stone Coal Creek, by large quantities of saw-logs and other matter which were floated against it, and which, by their weight and the force of the stream, caused the dam to give way. There was evidence tending to prove that the dam had been maintained ever since 1818; that the creek, in its natural condition, was not of sufficient capacity to float vessels, but that saw-logs could be floated in it upon the occurrence of floods caused by rains or by melting snows; that it was not used until 1880, except for the purpose of floating logs down as far as the plaintiff's mill, to be there made into lumber; that the injury of which plaintiff complained, if it happened at all, had resulted from logs being placed in the stream, to be floated down it, and which accumulated against plaintiff's dam because there was no opening through or around it. The plaintiff asked for the following instructions, which, on the objection of the defendants, were refused: "If the jury find that the plaintiff's dam was at the same place, and of like character in dimensions and height, for a period of twenty years or more, and had been so used for a period of twenty years or more, and further find that Stone Coal Creek, in which said dam existed, was floatable for saw-logs, and not for other purposes of navigation, still the plaintiff has a prescriptive right to have such dam, and so hold and use the same, notwithstanding said stream is floatable for saw-logs, and not for other purposes of navigation." And the defendants objected to the same, and thereupon the court sustained said objection, and refused to give said instructions to the jury, to which action of the court in sustain-

ing said objections, and in refusing to give said instructions to the jury, the plaintiff excepts, and tenders this, his bill of exception, which is signed by the court, and ordered to be made a part of the record hereof. The court, on request of the defendants, and against the objection and exception of the plaintiff, gave the jury instructions Nos. 4 and 5, as follows: No. 4. "If the jury believe that Stone Coal Creek is, and has always been, by reason of its natural capacity, navigable for floating lumber, logs, and other commercial goods, the right of the public to use the same for such purpose cannot be lost or forfeited by reason of non-user of it, or maintaining an obstruction thereto, for any length of time; and under such circumstances, the plaintiff could not acquire a right to maintain a dam or other obstruction to the public use of said stream." No. 5. "In determining the question of the navigability of Stone Coal Creek, it is the valuable, more than the continued, capacity that is to be considered. The real question is, Can it be made a valuable and beneficial aid to the public in getting the products of the country to market?" The jury returned a verdict for the defendants. The plaintiff then moved to set aside such verdict, and for a new trial, because of the alleged error of the court in refusing the instruction asked for by him, and giving the instructions Nos. 4 and 5 for the defendants, and the motion was overruled.

J. Brannon, for the plaintiff in error.

C. Boggess and L. Bennett, for the defendant in error.

GREEN, J. This was an action of trespass on the case, brought by the plaintiff, the owner of a mill and mill-dam on Stone Coal Creek, in Lewis County. The claim of the plaintiff was, that the defendants placed in this creek above said mill a number of saw-logs, which were floated down the stream upon which was his dam, so that by the pressure and weight thereof the dam was destroyed, and he was deprived of the use of the water in said creek for operating his mill, to his damage. The action is based on the plaintiff's claim of an exclusive right to use the water of this creek within his close as though it were a private stream. The jury and the court below rendered a verdict and judgment for the defendants, evidently basing their action on an ignoring of the plaintiff's claims, and on an assumption that the creek was a navigable stream of this state, which the public, and defendants as a portion of the general public, had a right to use as

a public highway by floating logs down the stream to market. And as there was no claim or proof that the defendants exercised this right improperly or negligently, and as the damage done the plaintiff by the breaking of his dam was an injury which was the result of his improperly obstructing a public highway, he has no right to complain of the defendants, who, when this injury occurred, were only using this public highway on Stone Coal Creek in a proper manner, and as any of the public had a right to use the same.

Does the record show that Stone Coal Creek was a private stream, and that the plaintiff had an exclusive right to use the water of this stream within this close? If so, the action and judgment of the court below must be reversed; otherwise it must be affirmed.

Whether a stream was navigable or non-navigable, in England, was generally determined in the old cases by the fact that the tide ebbed and flowed in the stream, and doubtless the tide does ebb and flow very generally in the navigable streams of the small island of Great Britain. But in the United States, in most of the navigable streams the tide does not ebb and flow. The great mass of the commerce of the United States is transported on waters in which the tide does not ebb and flow. And even when it is moved upon streams in which the tide does ebb and flow, it is only for a comparatively short distance, while for nearly the whole distance it has been moved from above the tide-water section of the country. Indeed, this is the case in many states of the Union that carry on a large commerce, and in which there is no tide-water,—our own state, for instance. But in none of these states has it ever been held that these are not navigable streams, simply because there was no ebb or flow of the tide. In the United States there are three classes of navigable streams: 1. Tidal streams, that are held navigable in law, whether navigable in fact or not; 2. Those that, although non-tidal, are yet navigable in fact for “boats or lighters,” and susceptible of valuable use for commercial purposes; 3. Those streams which, though not navigable for boats or lighters, are floatable, or capable of valuable use in bearing logs or the products of mines, forests, and tillage of the country they traverse to mills or markets.

With reference to the first of these classes, tidal streams, wherever the common law prevails, are held to be navigable. By the old English cases it is decided that all tidal waters

are navigable to the extent of the flow and reflow of the tide, and the absolute property interest in the same in their course, and the right of soil of owners of the land bounded by such tide-water streams extends only to high-water mark. But above the line where the tide ceases to have any effect, the rule of property is reversed, and the property in the soil or bed of the river is in the riparian proprietors; and this is true, also, of all streams not tidal,—that is, not legally navigable: See *Elder v. Burrus*, 6 Humph. 358, 366; *Stuart v. Clark's Lessee*, 2 Swan, 9; 58 Am. Dec. 49. In the latter case, McKinney, J., in delivering the opinion of the court, pages 13 and 14, says: "The rule of the common law as to what is a navigable river, namely, the flow and reflow of the tide, was declared by this court in *Elder v. Burrus*, 6 Humph. 358, 366, to be inapplicable in Tennessee. And such has been the course of decisions in some of the other American courts. This criterion, as applied to England, may be appropriate and practical, because, perhaps, it embraces pretty much the entire extent of all rivers which in point of fact are navigable; but it would be most absurd in its application to our large fresh-water rivers, which, though not subject to the influence of the tide, are yet fitted by nature in their ordinary state for all the common purposes of navigation. . . . According to the civil law, navigable rivers are not merely rivers in which the tide flows and reflows, but rivers capable of being navigated,—that is, navigable in the common sense of the term." See Angell on Watercourses, sec. 550.

With reference to the second of these classes of navigable streams, it will be observed from its definition that whether fresh-water streams be or be not navigable is a question of fact, and as such, those who claim such non-tidal streams to be navigable have on them the burden of proving that such streams are in fact navigable for boats or lighters, and susceptible of valuable use for commercial purposes in their natural state, unaided by artificial means or devices. The stream, too, to belong to this second class of navigable streams, must be thus capable of being navigable, not all the time, but for such length of time during the year as will make such stream valuable to the public as a public highway. But the fact that the stream cannot be so used at certain seasons of the year will not destroy the public right of navigation or make such streams non-navigable: See *McManus v. Carmichael*, 3 Iowa, 1; *Rhodes v. Otis*, 33 Ala. 578; 73 Am.

Dec. 439; *Morgan v. King*, 35 N. Y. 459; 91 Am. Dec. 58; *Berry v. Carle*, 3 Greenl. 269; *Wadsworth v. Smith*, 11 Me. 278; 26 Am. Dec. 525; *People v. Tibbetts*, 19 N. Y. 523; *Reynolds v. McArthur*, 2 Pet. 417; Wood on Nuisances, sec. 587.

The very definition of the third class of navigable streams shows that these streams would not be included in the common-law definition of a navigable stream, — that is, one in which the tide ebbs and flows. Nor could it come within the civil-law definition of a navigable stream, which is capable of being navigated by boats or lighters, and on which commerce may be carried on. Navigable streams of this class are generally called “floatable” streams; and though the public has a right to use them as a public highway by floating logs and other products of forests, mines, and tillage down them to mills and market, yet the riparian owners along such streams own the bed of them, as well as their banks, differing in this respect from other navigable streams. The respective rights on such floatable streams of the public and the riparian owners are well stated in *Lancey v. Clifford*, 54 Me. 487, 92 Am. Dec. 561. Dickerson, J., in delivering this opinion, says: “A stream which in its natural condition is capable of being used for floating logs, lumber, and rafts is subject to the public use as a highway, though it be private property, and not strictly navigable. This right of the public, however, must be exercised in a reasonable manner, since each person has an equal right with every other person to its enjoyment, and the enjoyment of it by one necessarily, to a certain extent, interferes with its exercise by another. What constitutes reasonable use by the public depends upon the circumstances of each particular case, as the occasions for the use are so numerous and diverse that no positive rule can be laid down to regulate it in every instance with anything like entire precision. The various purposes for which such a highway is used by the public, whether for transporting merchandise, rafting, driving, or booming logs, or securing them at the mill afterwards if necessary, require so much space as temporarily to obstruct the way; but if parties so conduct themselves in this business as to discommode others as little as is reasonably practicable, the law holds them harmless. If the rule of law was otherwise, the right of way in many cases could not be made available for any useful purpose: *Brown v. Chadbourne*, 31 Me. 9; 50 Am. Dec. 641; *Davis v. Winslow*, 51 Me. 264; 81 Am. Dec. 573. As respects the rights of the land-

owner to streams, it is to be observed that while he has a property in the stream, he has no property in the water itself, aside from that which is necessary for the gratification of his natural or ordinary wants. All the rest of the water is *publici juris*. *Aqua curret, et debet currere, ut currere solebat*. The right of enjoying this flow without disturbance, interference, or material diminution by any other proprietor is a natural right, and is an incident of property in the land, like the right the proprietor has to enjoy the soil itself without molestation from his neighbors. The right of property is in the right to use the flow, and not in the specific water. Each proprietor may make any use of the water flowing over his premises which does not essentially or materially diminish the quantity, corrupt the quality, or detain it so as to deprive other proprietors or the public of a fair and reasonable participation in its benefits: *Race v. Word*, 30 Eng. L. & Eq. 187; *Johnson v. Jordan*, 2 Met. 234; 37 Am. Dec. 85; *Dickinson v. Grand Junction Canal Co.*, 7 Ex. 282; *Tyler v. Wilkinson*, 4 Mason, 397. This rule does not require that there shall be no diminution, abstraction, or detention whatever by the upper or lower riparian proprietor, as that would be to prevent all reasonable use of it. The same principle in regard to use by the riparian proprietors applies as in the public use of the stream as a highway; it must be a reasonable use, and not inconsistent with the reasonable enjoyment of the stream by others who have an equal right to its use. Reasonable use is the touchstone for determining the rights of the respective parties. Thus, in considering this subject, we find the public right of way over the stream, and the land-owner's right of soil under it, and his right to use its flow. The rights of both these parties are necessary for the purposes of commerce, agriculture, and manufactures. The products of the forest would be of little value if the riparian proprietors have no right to raise the water by dams, and erect mills for the manufacture of these products into lumber. The right to use the water of such streams for milling purposes is as necessary as the right of transportation. Indeed, it is this consideration that oftentimes imparts the chief value to the estate of the riparian proprietors, and without which it would have no value whatever in many instances. Each right is the handmaid of civilization, and neither can be exercised without in some degree impairing the other. This conflict of rights, therefore, must be reconciled. The common law, in its wonderful adaptation

to the vicissitudes of human affairs, and to promote the comfort and convenience of men as unfolded in the progress of society, furnishes a solution of this difficulty by allowing the owner of the soil over which a floatable stream which is not technically navigable passes to build a dam across it, and erect a mill thereon, provided he furnishes a convenient and suitable sluice or passage-way for the public by or through his erections. In this way both these rights may be exercised without substantial prejudice or inconvenience."

These views are sustained not only by reason, but also by the decided weight of American authorities: See *Brown v. Chadbourne*, 31 Me. 9; 50 Am. Dec. 641; *Knox v. Chaloner*, 42 Me. 150; *Munson v. Hungerford*, 6 Barb. 268; *Burrows v. Gallup*, 32 Conn. 501; 87 Am. Dec. 186; *Volk v. Eldred*, 23 Wis. 410; *Moore v. Sanborne*, 2 Mich. 523; 59 Am. Dec. 209; *Wadsworth v. Smith*, 11 Me. 278; 26 Am. Dec. 525; *Neaderhouser v. State*, 28 Ind. 270; *Veazie v. Dwinel*, 50 Me. 479; *People v. Platt*, 17 Johns. 195; 8 Am. Dec. 382; *Curtis v. Keesler*, 14 Barb. 511; *Hubbard v. Bell*, 54 Ill. 112; 5 Am. Rep. 98; *Treat v. Lord*, 42 Me. 552; 66 Am. Dec. 298; *Walker v. Shepardson*, 4 Wis. 485; 65 Am. Dec. 324; *Stuart v. Clark*, 2 Swan, 9; 58 Am. Dec. 49; *Weise v. Smith*, 3 Or. 445; 8 Am. Rep. 621; *Felger v. Robinson*, 3 Or. 458; *Rhodes v. Otis*, 33 Ala. 578; 73 Am. Dec. 439; *Commonwealth v. Chapin*, 5 Pick. 199; 16 Am. Dec. 386.

The old English cases do not decide that any stream is navigable or a public highway, unless the tide ebbs and flows in such stream, and then, when it is thus a tidal stream, it is held to be a navigable stream in law, whether in fact it be or be not navigable. But, as we have shown, the civil law held as navigable every stream, whether thus tidal or not, if it is in point of fact navigable by boats and lighters, so that it was in its natural state capable of being used by the public profitably to carry on commerce in the usual manner; and this has been universally held to be law in the United States, and though perhaps it would be difficult to find such decisions in England, yet I apprehend it has always been the common law of England, though the occasion to so declare it may not have arisen in any English case. Thus Lord Hale, who is the highest English authority on this subject, in chapter 3 of his treatise *De Jure Maris* says: "There be some streams or rivers that are private not only in property or ownership, but in use, as little streams and rivers that are not of common

passage for the king's people. Again, there be other rivers, as well fresh as salt, that are of common or public use for carriage of boats and lighters; and these, whether they are fresh or salt, whether they flow or reflow or not, are *prima facie publici juris*,—common highways for men, or goods, or both, from one inland town to another. Thus the rivers of Wey, of Severn, and of Thames, as well above the bridges and forts as below, as well above the flowings of the sea as below, and as well where they have come to be private property as in what part they are the king's property, are public rivers *juris publici*."

The third class of public highways, floatable streams, are not, so far as I know, recognized in England, and I doubt whether they, in point of fact, exist in England. But they are very common in the United States; and, as we have seen, while they are the private property of the riparian owners, yet the public has a right to use them as public highways to float their lumber and other products of their land to mill or market, and the riparian proprietor cannot so use these streams as unreasonably to incommode and hinder the public from using them for such floating purposes.

We will now apply these principles of law to the case under our consideration. The court below did not err in refusing to give the instruction asked for by the plaintiff. It was: "If the jury find that plaintiff's dam was at the same place, and of like character and dimensions and height, for a period of twenty years or more, and further find that Stone Coal Creek, in which said dam existed, was floatable for saw-logs, and not for other purposes of navigation, still the plaintiff had a prescriptive right to have such dam, and so hold and use the same, notwithstanding said stream is floatable for saw-logs, and not for other purposes of navigation." In such floatable stream as is described in this instruction, the plaintiff, a riparian proprietor, had a right, as we have seen, to build a mill, and erect a dam across the stream to accumulate water to run his mill; and this right belonged to him as a riparian proprietor, and did not depend upon his having acquired it by prescription by the use of such dam and mill for twenty years.

It will be observed that Lord Hale, in laying down the rights of the riparian owners and of the public in such streams, makes no mention of prescription or length of time by which the rights are obtained, either by the public or by the ripa-

rian owners. But he speaks of the actual use in fact of the stream as a public highway as establishing the right of the public to such use; and this for the obvious reason that such actual use by the public of such stream as a public highway proves that such stream is capable of such use by the public, and it is this which makes it a public highway, though the public has not before exercised its rights. So we have seen the riparian owner has a right to use the banks of such stream and the flow of water in it for his private property, though he has not heretofore exercised this right, if he exercise it in such a reasonable manner as not to interfere unnecessarily in an injurious way with the public right to use such stream as a public highway for floating logs down such stream to market or to mills.

There is nothing in this record from which the jury could infer that the defendants used this Stone Coal Creek in an unreasonable manner as a public highway down which to float logs to market or mills. On the contrary, the inference might be drawn that the plaintiff or riparian owner did undertake to use the flow of the water in this creek in an unreasonable manner, thereby unnecessarily prejudicing the rights of the defendants, as a portion of the public, to use such stream to float their logs down the same to mills or markets. That their right of so floating their logs was so unnecessarily prejudiced appears from the fact that these logs so floated lodged against a dam, which the plaintiff had built across the stream, and were thus detained, till by their pressure they broke the dam down. Such a dam on such a stream was a public nuisance, unless the owner had provided suitable sluices to allow logs floated down the creek to pass around or through said dam, and the record does not state that any such sluices were made and kept up by the plaintiff. On the contrary, the fact that the logs, by their weight, broke the dam would seem to indicate clearly that there were no sluices by which they could have passed through, or they could not have carried away this dam of the plaintiff; for, had there been such sluices, these logs would hardly have accumulated in this dam, till by their pressure the dam was broken. The erection of such dam across such floatable stream, without making or keeping such suitable sluices for the passage around or through such dam of logs floating in the stream, is a nuisance.

It was held in *Brown v. Chadbourne*, 31 Me. 9, 50 Am.

Dec. 641, which was a case in which an individual recovered against the riparian owner of land along a floatable stream not, properly speaking, navigable, for maintaining a dam across such stream without maintaining suitable sluices around or through it for the passage of logs. This case would closely resemble the case before us, if the defendants had sued the plaintiff for injuring them by unreasonably interfering with their right of floating logs. The law is so well stated by Wells, J., in delivering the opinion of the court in that case, that I cannot better express it than by quoting portions of his opinion. He says: "This is an action on the case for erecting and maintaining a dam across a stream called Little River, and obstructing the passage of the water and the plaintiff's logs. The river is about three miles in length, and runs from Boyden's Lake to the tide-waters. It varies in its width from seven or eight feet to three or four rods; and it has been used many years for floating logs and rafts, and sometimes boats. Within twenty years, several dams and mills have been erected upon it. The plaintiff disclaimed the right to recover upon the ground of prescription or user, but claimed it because the stream was a public one in its natural state. The jury were instructed that, it being a fresh-water stream, the presumption is, that it is private property, and the burden is on the plaintiff to establish the contrary by satisfactory proof that it is a navigable or floatable river, and in its natural condition capable of being used for running logs. The rule of the common law, that riparian proprietors own to the thread of fresh-water rivers, has been adopted in this and many other states of the Union: *Berry v. Carle*, 3 Greenl. 269; *Spring v. Russell*, 7 Greenl. 273. The first question that arises is, it being conceded that the bed of the river belongs to the owners of the land on either side, Can a right to the use of its waters be obtained, unless that use has been continued twenty years,—the ordinary length of time for the acquisition of an easement? In *Berry v. Carle*, 3 Greenl. 269, *Shaw v. Crawford*, 10 Johns. 236, *Scott v. Willson*, 3 N. H. 321, the right is considered as dependent on long usage."

He then quotes what is laid down by Lord Hale in his celebrated treatise *De Jure Maris*, above stated, and makes on it this comment: "He makes no mention of prescription or length of time by which the right is obtained, but of the actual use in fact, as indicating public rivers."

In *Wadsworth v. Smith*, 11 Me. 278, 26 Am. Dec. 525, the doctrine is stated by Parris, J., that when a stream is naturally of sufficient size to float boats or mill-logs, the public has a right to the free use for that purpose. But such little streams or rivers as are not floatable, that cannot in their natural state be used for the carriage of boats, rafts, or other property, are wholly and absolutely private, not subject to the servitude of the public interest, not to be regarded as public highways by water, because they are not susceptible of use as a common passage for the public. The same principle was stated by Mellen, C. J., in *Spring v. Russell*, 7 Greenl. 273; and is also recognized in Angell on Tide-waters, 75; *Palmer v. Mulligan*, 3 Caines, 307; 2 Am. Dec. 270. The distinguishing test between those rivers which are entirely private property and those which are private property subject to the public use and enjoyment consists in the fact that they are or are not susceptible of use as a common passage for the public: Per Spencer, C. J., in *People v. Platt*, 17 Johns. 216; 8 Am. Dec. 382; *Hooker v. Cummings*, 20 Johns. 90; 11 Am. Dec. 249. The right of passage and of transportation upon rivers not strictly navigable belongs to the public by the principles of the common law: Per Parker, C. J., in *Commonwealth v. Chapin*, 5 Pick. 199; 16 Am. Dec. 386. This subject was very fully considered with great ability in *Esson v. McMaster*, in the province of New Brunswick, 1 Kerr, 501, deciding the rule of law as it is stated to be in *Wadsworth v. Smith*, 11 Me. 278; 26 Am. Dec. 525. The case of *Rowe v. Titus*, 1 Allen (N. B.) 326, in that province, was decided upon the same principle. See also *Adams v. Pease*, 2 Conn. 481; *Carson v. Blazer*, 2 Binn. 475; 4 Am. Dec. 463; *Shrunk v. Schuylkill Navigation Co.*, 14 Serg. & R. 71.

If a stream could be subjected to public servitude by long use only, there are many large rivers in newly-settled states, and some in the interior of this state, of which the public would be deprived of the use, although nature has plainly declared such rivers to be public highways. The true test, therefore, to be applied in such cases is, whether a stream is inherently in its nature capable of being used for the purpose of commerce for the floating of vessels, boats, rafts, or logs. When a stream possesses such a character, then the easement exists, leaving to the owner of the bed all other modes of use not inconsistent with it; for in this state the rights of public use have been carried so far as to place fresh-water streams

on the same ground as those in which the tide ebbs and flows, and which alone are considered strictly navigable at common law, and to exclude the owners of the banks and beds from all property in them. In some states of the Union such a rule has been established by judicial decisions, and in others by legislative acts.

It is contended that, to show a river is public, it is not enough to prove that logs may be floated down at a certain season of the year, when it is affected by a freshet, but it should have that capacity in its natural and ordinary state at all seasons of the year. None of the authorities require the stream to possess the quality of being capable of such use during the whole year. A distinguishing criterion consists in its fitness to answer the wants of those whose business require its use. Its perfect adaptation to such use may not exist at all times, although the right to it may continue, and be exercised whenever an opportunity occurs. In many rivers, where the tide ebbs and flows, the public are deprived of their use for navigation during the reflux in their waters. A way over which one has a right to pass may be periodically covered with water. In high northern latitudes most fresh-water rivers are frozen over during several months of the year; even some tide-waters are incapable of any beneficial use for purposes of commerce in the season of winter, owing to the accumulation of ice.

The lapse of time during which a dam has been used across a floatable stream by a riparian owner can give no prescriptive right to such use as against and to the prejudice of the public use, though it might give a right to keep up such dam as against another riparian owner by prescription. If the law was otherwise, in many parts of the United States, and in portions of this state, the public would necessarily lose the use of many floatable streams in which riparian owners have kept up dams for more than twenty years before the public had any occasion to float logs down them, because the banks of the stream remained unsettled, and the timber on such stream, therefore, entirely uncut. The riparian owner of such dam could never acquire by prescription an exclusive right to the use of such stream, as if it were a private stream, as against the public. Therefore this instruction, asked by the plaintiff and refused by the court below, was properly refused, if it meant to declare the law to be that the plaintiff had or could acquire the exclusive right to use the water of

Stone Coal Creek as if it were a private stream, as against the public use of it as a floatable stream, by maintaining a dam across it for twenty years. And if this instruction did not mean this, but merely "that the plaintiff had, as riparian owner, the right to maintain and construct a dam, to use the water of this stream for his mill, but in such a way as to be consistent with the right of the public to use the water of this stream to float logs to market down it," then this was correct law; but the instruction ought to have been refused if it was believed to have been immaterial, and calculated to mislead the jury.

We have seen that if, as assumed in this instruction, Stone Coal Creek is a floatable, but not strictly navigable, stream, the plaintiff, as a riparian owner, had a perfect right to erect his mill and to build his dam, provided he did not unreasonably obstruct or interfere with the public use of this stream in times of flood. This reasonable use of the water of this stream by the plaintiff, and of his dam across the same, would have existed had the plaintiff made and kept in repair suitable sluices in or around said dam, through which logs might pass while being floated down this stream. This he did not do, but, on the contrary, it would seem from the record, he unnecessarily obstructed the passage of logs floating down this stream. His dam was broken as the result of his illegal and improper obstruction of the logs floating in this stream; and he had therefore no right to recover in this suit.

The court below did not err in giving the instructions Nos. 4 and 5, asked for by the defendants. They were as set forth in bill of exceptions No. 2, as set out in statement of the case. It will be seen that these instructions are in strict accord with the law as we have stated it above, and of course the court below did not err in refusing to grant a new trial, and in entering up the judgment it did for the defendants.

We have decided this case and written this opinion as if the respective rights of the public and the riparian owners on and in Stone Coal Creek were governed solely by the commerce law. It is true, there are statutes of Virginia and of this state which may or may not affect this question. If these statutes are applicable to this stream, they put the right of the public and the riparian owner on the same footing as if Stone Coal Creek was a tidal river, and strictly and legally navigable. In regarding these statutes as inapplicable to Stone Coal Creek, we have taken the view most favorable to

the plaintiff in error. The record is so imperfect that we do not know whether the statutes have or have not any application to the Stone Coal Creek. These statutes are thus referred to and stated by Minor in his Institutes (vol. 2, p. 20): "At common law, the beds of rivers not navigable are always private, and belong to the neighbor riparian proprietors, each coming *ad filum fluminis*; or if the same person own both banks, the whole bed belongs to him, subject, however, in both cases, to whatever use the public may be able to make of a stream for a public highway for boats or rafts. In Virginia, the principle is only so far changed as that by statute the banks, shores, and beds of all streams are reserved which were granted by the state east of the Blue Ridge after 1780, and west of it after 1802." Whether this law would affect Stone Coal Creek would depend on whether the riparian owners on that stream claim under patents prior or subsequent to 1802. What is the fact on this question the record does not disclose.

The judgment of the court below must be affirmed. Defendants in error must recover of the plaintiff in error their costs in this court expended, and thirty dollars damages.

WATERCOURSES — NAVIGABLE STREAMS — WHAT ARE. — Navigability in fact, and not the ebb and flow of the tide, is the test in Pennsylvania: *Fulmer v. Williams*, 122 Pa. St. 191; 9 Am. St. Rep. 88, and note. A river is regarded as navigable upon which commerce may be conducted: *Hickok v. Hine*, 23 Ohio St. 523; 13 Am. Rep. 255, and note; *Monongahela etc. Co. v. Kirk*, 46 Pa. St. 112; 84 Am. Dec. 527, and note. Streams capable of being used for floating vessels, rafts, or logs are navigable, and therefore public highways: *Brown v. Chadbourne*, 31 Me. 9; 50 Am. Dec. 641, and note; *Wadsworth v. Smith*, 11 Me. 278; 26 Am. Dec. 525, and note; *Robinson v. Shanks*, 118 Ind. 125; *St. Louis etc. R'y Co. v. Ramsey*, 53 Ark. 314; 22 Am. St. Rep. 195, and note.

WATERCOURSES — NON-TIDAL STREAMS — BURDEN OF PROOF OF NAVIGABILITY. — Where a stream is above tide-water, the *onus* of proof rests upon the party claiming for it the character of a navigable stream: *Rhodes v. Otis*, 33 Ala. 578; 73 Am. Dec. 439; *Case v. Woolley*, 6 Dana, 17; 32 Am. Dec. 54.

WATERCOURSES — RIGHTS OF LAND-OWNERS IN FLOATING STREAMS. — Riparian owners hold their lands subject to the right of the public to use the streams flowing through them, navigable in character: *Brooks v. Cedar Brook etc. Imp. Co.*, 82 Me. 17; 17 Am. St. Rep. 459, and note. One has a right to use a stream in a reasonable manner to float his logs: *Carter v. Thurston*, 58 N. H. 104; 42 Am. Rep. 584; *Davis v. Winslow*, 51 Me. 264; 81 Am. Dec. 573, and extended note. *Contra*, see *Hubbard v. Bell*, 54 Ill. 110; 5 Am. Rep. 98, and note. The right to use a navigable stream is a public and not a private right, and the owner of land on the stream cannot maintain an action for the same: *Swanson v. Mississippi etc. Boom Co.*, 42 Minn. 532.

WATERCOURSES — FLOATABLE STREAM — RIGHT OF LAND-OWNER TO ERECT MILL-DAM. — The owner of soil over which a floatable stream passes may build a dam across it, but he must furnish a suitable sluice for the public by or through his dam: *Lancey v. Clifford*, 54 Me. 487; 92 Am. Dec. 561; *Dwinnel v. Veazie*, 44 Me. 167; 69 Am. Dec. 94, and note; note to *State v. Thompson*, 47 Am. Dec. 589; *Richards v. Peter*, 70 Mich. 286.

STATE v. GOODWILL. STATE v. MINOR.

[33 WEST VIRGINIA, 179.]

CONSTITUTIONAL LAW — EQUAL RIGHTS. — THE RIGHTS OF EVERY INDIVIDUAL must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances, and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void.

CONSTITUTIONAL LAW. — THE POLICE POWER, however broad and extensive, is not above the constitution, and must be exercised in subordination to it.

CONSTITUTIONAL LAW — EMPLOYERS AND EMPLOYEES. — A statute declaring that all persons engaged in mining coal, ore, or other minerals, or mining or manufacturing them, or either of them, or manufacturing iron or steel, or both, or any other kind of manufacturing, shall not issue, for the payment of labor, any order or other paper, unless the same purports to be redeemable at its face value in legal money of the United States, bearing interest at the legal rate, made payable to the employee or bearer, and redeemable within thirty days by the maker thereof, is unconstitutional and void.

Henritze and Haythe, C. W. Smith, J. W. St. Clair, and Brown and Jackson, for the plaintiffs in error.

Alfred Caldwell, attorney-general, for the state.

SNYDER, P. These two cases present the same questions and may therefore be considered together. The first is a writ of error to a judgment of the circuit court of Mercer County pronounced on April 3, 1889; and the second is a writ of error to a judgment of the circuit court of Fayette County pronounced September 29, 1887. Both are indictments and convictions for the violation of section 3 of chapter 63, Acts of 1887: See Code 1887, p. 963.

The title of said act is as follows: "An act to secure to operatives and laborers engaged in and about mines, manufactories of iron and steel, and all other manufactories, the payment of their wages at regular intervals, and in lawful money of the United States." And the first and third sec-

tions are in these words: "1. That all persons, firms, corporations, or associations in this state engaged in mining coal, ore, or other minerals, or mining and manufacturing them, or either of them, or manufacturing iron or steel, or both, or any other kind of manufacturing, shall pay their employees as provided in this act. . . . 3. That it shall not be lawful for any person, firm, company, corporation, or association engaged in the business aforesaid, their clerk, agent, officer, or servant, in this state, to issue for the payment of labor any order or other paper whatsoever, unless the same purports to be redeemable, for its face value, in lawful money of the United States, bearing interest at the legal rate, made payable to employee or bearer, and redeemable within a period of thirty days by the person, firm, company, corporation, or association giving, making, or issuing the same." The residue of the section makes its violation a misdemeanor, and fixes the penalty at not less than twenty-five dollars, or more than one hundred dollars.

There was a demurrer to each of the indictments, which was overruled by the court; and the plaintiffs in error assign this as ground for the reversal of the judgments.

The main question argued before this court is, whether or not the said statute is constitutional, the counsel for the plaintiffs in error contending that it is unconstitutional and void, and the attorney-general insisting that it is a proper exercise of the police power, and therefore not unconstitutional and void.

It will be observed that this statute applies to certain specified classes of persons, firms, companies, corporations, and associations, and none others. It is by its terms limited to persons, corporations, etc., engaged in mining coal or other minerals, or any kind of manufacturing. While these terms include not only all persons engaged in mining coal and other minerals, and all persons engaged in manufacturing iron and steel, but also all persons engaged in any kind of manufacturing, such as the shoemaker, the cigar-maker, the undertaker, the distiller, the brick-maker, the jeweler, the **weaver**, the milliner, the dairy-man, and the miller, it does not include the wholesale merchant with his hundreds of clerks and agents, the railroad construction companies or railroad companies with their thousands of employees. The propriety or the necessity, if such exists, of applying the provisions of the statute to these latter is equally as great, if not greater,

as it is to any of the former. The rights and privileges of certain specified employers are abridged, while others of the same class are left free.

By the first section of the fourteenth amendment of the constitution of the United States, all persons born or naturalized in the United States are made citizens thereof; and it then declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." And the bill of rights of this state declares that "all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety": Const., art. 3, sec. 1. Can the legislature, in view of these constitutional guaranties, limit or forbid the right of contract between parties under no mental, corporal, or other disability, when the subject of contract is lawful, not public in its character, and the exercise of it is purely private, and personal to the parties themselves?

The court, in *People v. Gillson*, 109 N. Y. 398, 4 Am. St. Rep. 465, says: "The term 'liberty,' as used in the constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation": Field, J., in *Butchers' Union etc. Co. v. Crescent City etc. Co.*, 111 U. S. 755; *Butchers' Ass'n v. Crescent City Co.*, 1 Abb. 398.

The court in *Civil Rights Cases*, 109 U. S. 23, says: "Under the Fourteenth Amendment, it [Congress] has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws. . . .

Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment, which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse-stealing, for example) to be seized and hung by the *posse comitatus* without regular trial; or denying to any person or class of persons the right to pursue any peaceful avocation allowed to others. What is called 'class legislation' would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment."

The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, and the mass of the community, and those who make the law, by another; whereas a like general law affecting the whole community equally could not have been enacted: *Wally v. Kennedy*, 2 Yerg. 554; 24 Am. Dec. 511.

The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses. A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit. And as incident to this is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue, and give evidence, and

to inherit, purchase, lease, sell, and convey property of every kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery; between liberty and oppression. These principles have been fully recognized and announced in many decisions of the supreme court of the United States and other courts: *Yick Wo v. Hopkins*, 118 U. S. 356; *Slaughter House Cases*, 16 Wall. 36; *Butchers' Union Co. v. Crescent City etc. Co.*, 111 U. S. 746; 6 Myer's Fed. Dec., sec. 1000; *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377; 52 Am. Rep. 34; *Ex parte Westerfield*, 55 Cal. 550; 36 Am. Rep. 47; *Ragio v. State*, 86 Tenn. 272; *State v. Divine*, 98 N. C. 778.

The vocation of an employer, as well as that of his employee, is his property. Depriving the owner of property of one of its attributes is depriving him of his property, under the provisions of the constitution: *People v. Otis*, 90 N. Y. 48. The right to use, buy, and sell property, and contract in respect thereto, including contracts for labor, — which is, as we have seen, property, — is protected by the constitution. If the legislature, without any public necessity, has the power to prohibit or restrict the right of contract between private persons in respect to one lawful trade or business, then it may prevent the prosecution of all trades, and regulate all contracts. "Questions of power," says Marshall, C. J., in *Brown v. Maryland*, 12 Wheat. 419, "do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed."

No one questions the position that, unless the government intervened to protect property and regulate trade, property would cease to exist, and trade would exist only as an engine of fraud; but this does not authorize the government to do for its people what they can do for themselves. The natural law of supply and demand is the best law of trade. In *Munn v. Illinois*, 94 U. S. 113, and other cases involving the same questions, the supreme court of the United States has held that persons or corporations engaged in occupations in which the public have an interest or use may be regulated by statute. But the reasons assigned for these decisions are, that the public has a use in these occupations, and that the persons engaged in them are in the exercise of a public franchise, or special privileges, not enjoyed by others not so en-

gaged; that their business implies a trust and public duty; and that the government has therefore the power to see that this trust is not abused, and that the duty imposed by it is properly performed. On this principle, statutes have been upheld which regulate the charges of railroad companies and other common carriers; elevator, telephone, telegraph, and other companies; hackmen, warehousemen, owners of water-mills, etc. But we are aware of no well-considered case in which a statute has been upheld that undertook to regulate the dealings between employer and employee, even in this class of occupations, much less in cases that are not impressed with a public trust or duty.

But the claim is made that the legislature should pass the act now in question, in the exercise of the police power which every sovereign state possesses. That power is very broad and comprehensive, and is exercised to promote the health, safety, and welfare of society. Its exercise in extreme cases is frequently justified by the maxim, *Salus populi suprema lex est*. It is used to regulate the use of property by enforcing the rule, *Sic utere tuo ut alienum non lædas*. Under it, the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other; and in cases of great emergency, engendering overruling necessity, property may be taken or destroyed without compensation. The limit of the power cannot be accurately defined, and the courts have not been willing definitely to circumscribe it. But this power, however broad and extensive, is not above the constitution, which is the supreme law; and, so far as it imposes restraints, the police power must be exercised in subordination to it: *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636; Cooley's Constitutional Limitations, 719; *Mugler v. Kansas*, 123 U. S. 623.

Generally, it is for the legislature to determine what laws and regulations are proper in the exercise of the police power; but if it passes an act ostensibly for the public health or safety, and thereby destroys or takes away the property of a citizen, or interferes with his rights or personal liberty, then it is for the courts to determine whether it is a proper and reasonable exercise of the power, and if it is not, to declare it void: *Austin v. Murray*, 16 Pick. 121; *State v. Gilman*, 33 W. Va. 146.

The right to regulate the rate of interest existed at the time

the constitution was adopted, and cannot therefore be considered as either an abridgment or restraint upon the rights of the citizen guaranteed by the constitution. The power to pass usury laws exists by immemorial usage; but such is not the case with such acts as we are now considering: *Munn v. Illinois*, 94 U. S. 113, 153.

Our act is almost a literal copy of an act passed by the legislature of Pennsylvania on June 29, 1881: Pa. Laws, 1881, p. 147. In *Godcharles v. Wigeman*, 113 Pa. St. 431, the supreme court of that state declared the first four sections of that act unconstitutional and void. The court, in its opinion, says: "The first, second, third, and fourth sections of the act of June 29, 1881, are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the rights of the employer and the employee. More than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void."

In *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, the supreme court of Illinois, in a well-considered opinion, held unconstitutional and void an act of the legislature of that state which required the owners or operators of mines to provide scales for weighing their coal, and make the weight of coal the basis of the wages of miners. A part of the *syllabus* is as follows: "It is not competent for the legislature, under the constitution, to single out owners and operators of coal mines and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. Such legislation cannot be sustained as an exercise of the police power."

In view of what the courts have uniformly held in respect to this class of legislation, it is needless to prolong this discussion. It is a species of sumptuary legislation which has been universally condemned, as an attempt to degrade the Intelligence, virtue, and manhood of the American laborer,

and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a knave and the laborer an imbecile.

"Such legislation," as is well said by the court in *In re Jacobs*, 98 N. Y. 114, 50 Am. Rep. 636, "may invade one class of rights to-day and another to-morrow; and if it can be sanctioned under the constitution, while far removed in time, we shall not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since, in all civilized lands, regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry, and cause a score of ills while attempting the removal of one."

For the reasons aforesaid, we are clearly of opinion that the said third section of the act aforesaid is unconstitutional and void. In arriving at this conclusion, we have not been unmindful that the power of the courts to condemn legislative acts as unconstitutional is one of great delicacy, and to be exercised with extreme caution, and even with reluctance. But, as said by Chancellor Kent (1 Kent's Com. 450), "it is only by the free exercise of this power that courts of justice are enabled to repel assaults, and protect every part of the government and every member of the community from undue and destructive innovations upon their charter rights."

The statute itself being, as we have seen, unconstitutional and void, there could be no valid indictment founded upon it; and consequently the circuit court erred in overruling the demurrer to the indictment in each of these cases; and for that reason the judgments of the circuit court are reversed, and the defendants discharged.

The Fourteenth Amendment Considered with Relation to Special Privileges, Burdens, and Restrictions.*

The First Section of the Fourteenth Amendment to the constitution of the United States declares that "all persons born or naturalized in the United

* REFERENCE TO MONOGRAPHIC NOTES.

Statutes prohibiting adulteration of milk: 51 Am. Rep. 347-354.

Statutes prohibiting business on Sunday: 49 Am. Dec. 616-623.

Statutes regulating sales of intoxicating liquors: 35 Am. Dec. 331-334.

States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Many of the state constitutions contain provisions of nearly similar import, the object of which is to secure to all persons equality before the law, and to prevent the imposition of burdens upon one person to which others are not subject under the same circumstances. No questions exceed in interest and importance those which present for judicial determination the validity of statutes assailed on the ground that they concede privileges to, or impose penalties or burdens upon, one or more persons to which others belonging to the same class are not entitled in the one case and not liable in the other.

Original Purpose of the Fourteenth Amendment. — Speaking of the amendments to the constitution of the United States adopted at the close of the Civil War, the supreme court said: "We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all, and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who formerly exercised unlimited dominion over him. It is true that only the Fifteenth Amendment in terms mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them, as the fifteenth. We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may be safely trusted to make it void. And so if other rights are assailed by the states which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood, is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it": *Slaughter House Cases*, 16 Wall. 71; *Plunkard v. State*, 67 Md. 364. With respect to the privileges or immunities of citizens of a state as contradistinguished from the privileges or immunities of citizens of the United States, the decision from which we have just quoted established that it was the latter only which were secured by the Fourteenth Amendment, and that if there were any difference between the privileges and immunities "belonging to a citizen of the United States as such, and those belonging to a citizen of a state as such, the latter must rest for their security and protection where they have heretofore rested; for

they are not embraced within this paragraph of the amendment; and furthermore, that the inhibition against any state denying to any person within its jurisdiction the equal protection of its laws was chiefly designed to render void "laws in the states where the newly emancipated negroes resided which discriminated with gross injustice and hardship against them as a class, "and to forbid the enactment or enforcement of such laws in the future."

Privileges and Immunities of Citizens. — The Fourteenth Amendment did not add to the privileges and immunities of any citizen of the United States, but merely furnished additional guaranties of such as he already had. Hence, as the right of suffrage was not necessarily a privilege of a citizen, it was not conferred upon any person by that amendment: *Minor v. Happersett*, 21 Wall. 162. The only consequence of its denial was, when denied to any male citizen and inhabitant of a state more than twenty-one years of age, except for participation in some crime, a diminution in the number of representatives in Congress, and electors for President and Vice-President, to which the denying state was otherwise entitled. Nor has any amendment given to all citizens the right to vote, though the fifteenth has prohibited the denial of that right "on account of race, color, or previous condition of servitude." The result is, that any state may discriminate between its citizens by denying to some of them the right of suffrage, provided the test of exclusion is not that of race, color, or previous condition of servitude: *United States v. Reese*, 92 U. S. 214; *United States v. Cruikshank*, 92 U. S. 542. Nor is the right to practice law: *Bradwell v. State*, 16 Wall. 130; or to have a cause in a state court tried before a jury: *Walker v. Sauvinet*, 92 U. S. 90, — a privilege or immunity secured by this amendment. And if there is any privilege or immunity of a citizen of the United States which could have been abridged by a state before the adoption of this amendment, and which has by the amendment been withdrawn from the power of state abridgment, it does not stand revealed in any light emitted by the highest of the national courts. The real force of the amendment is contained in its clauses declaring who are citizens, and prohibiting the denial of the equal protection of the laws and the deprivation of life, liberty, or property without due process of law.

Who are Protected by the Fourteenth Amendment. — While, as indicated in the *Slaughter House Cases*, the purpose of the Fourteenth Amendment of protecting the enfranchised negro against oppression and unjust discrimination may properly be considered in determining whether the special privileges granted or burdens exacted by a statute are forbidden by the amendment, and the fact that the statute in question is or is not against or specially applicable to that race may exercise a great or even paramount influence in the deliberations of the judiciary, yet there is no doubt that all other races or persons within the jurisdiction of the state, whether citizens or aliens, "without regard to any differences in race, color, or nationality," are within the protection of that portion of the amendment prohibiting any state from depriving any person of life, liberty, or property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws: *Yick Wo v. Hopkins*, 118 U. S. 369. As to non-residents, a different rule may apply. If they are citizens of the United States, the privileges and immunities to which they are entitled as such are by the express terms of the amendment not to be impaired by any state; but if there is any immunity or privilege peculiar to the citizen of a state, and not possessed by other citizens of the United States, it may doubtless be withheld from non-

residents. It has been decided that a state may impose conditions upon non-residents suing in its courts not imposed upon residents, — such, for instance, as requiring them to give security for costs: *Cummings v. Wingo*, 31 S. C. 427; or may deny to non-residents the right to sue foreign corporations in its courts, unless the cause of action shall have arisen, or the subject of the action shall be situated within, the state: *Central etc. Co. v. Georgia etc. Co.*, 32 S. C. 319. So far as a state possesses property, it may restrict the right to use it to residents. Hence it may prohibit residents of other states from planting or taking oysters, or fishing in tide or other waters, the ownership of which is vested in the state: *People v. Loundes*, 130 N. Y. 455; *McCready v. Virginia*, 94 U. S. 391; *Commonwealth v. Manchester*, 152 Mass. 280; 23 Am. St. Rep. 820; *Manchester v. Massachusetts*, 139 U. S. 240. The privileges to which non-residents are entitled under the constitution must, we apprehend, be those secured them by section 2 of article 4, declaring that “the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.” The consideration of this clause of the constitution is not within the purview of the present note. The leading decisions construing it are *Corfield v. Coryell*, 4 Wash. C. C. 380; *Conner v. Elliott*, 18 How. 591; *Paul v. Virginia*, 8 Wall. 180; *Ward v. Maryland*, 12 Wall. 418.

Corporations, to What Extent Protected.—Private corporations must also be regarded as persons to whom the equal protection of the laws must not be denied, and who cannot be deprived of property without due process of law: *Santa Clara Co. v. Southern Pac. R. R. Co.*, 118 U. S. 394; *Charlotte etc. R. R. Co. v. Gibbs*, 142 U. S. 386; *Minneapolis etc. R’y Co. v. Beckwith*, 129 U. S. 26; *Missouri Pac. R’y Co. v. Mackey*, 127 U. S. 205; *Minneapolis etc. R’y Co. v. Herrick*, 127 U. S. 210. “The equal protection of the laws which these bodies may claim is only such as is afforded similar associations within the jurisdiction of the state”: *Pembina etc. Milling Co. v. Pennsylvania*, 125 U. S. 181. A private corporation is not, however, a citizen of the United States within the meaning of the prohibition against abridging the privileges and immunities of citizens of the United States: *Paul v. Virginia*, 8 Wall. 168. “The state is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is no every corporation lawful in the state of its creation that other states may be willing to admit within their jurisdiction, or consent that it have offices in them, — such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other states, the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character. The states may therefore require for the admission within their limits of the corporations of other states, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the Fourteenth Amendment. As to the meaning and extent of that section of the amendments, see *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; *Missouri v. Lewis*, 101 U. S. 22, 30; *Missouri Pac. R’y Co. v. Humes*, 115 U. S. 512; *Yick Wo v. Hopkins*, 118 U. S. 356; *Hayes v. Missouri*, 120 U. S. 68; *People v. Wemple*, 131 N. Y. 64. The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits or hiring offices for that purpose, or to exact conditions for

allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by state authority": *Pembina etc. Milling Co. v. Pennsylvania*, 125 U. S. 181. And when a foreign corporation has not complied with the conditions required by the laws of a state to authorize it to do business therein, the act of its agents in coming within the state for the purpose of there doing business may by its laws be declared a crime, and punished as such: *Moses v. State*, 65 Miss. 56.

Nor has any domestic corporation a right to do business or to otherwise exercise its franchise within a state except by its permission. Having power to withhold such permission altogether, the state may grant it upon such conditions as it sees fit, and the exercise of the franchise is an acceptance of the conditions. One of the conditions may be the payment of a tax on the corporate franchise or business. This tax may be exacted of both foreign and domestic corporations doing business or otherwise exercising their franchises in the state. The amount of the tax, the basis upon which it shall be computed, the mode in which it may be ascertained, and the manner in which its collection shall be enforced, are matters for consideration and determination by the state legislature, whose judgment as expressed in its enactments is not subject to review by the judiciary. Nor is it any valid objection to such enactments that, taken in connection with other laws imposing taxes and exacting license fees, they may result in the corporations affected by them being compelled to contribute to the revenues of the states sums largely in excess of those contributed by private persons engaged in the same class of business, and using in its transaction property of the same kind, amount, and value: *Horn S. M. Co. v. New York*, 143 U. S. 305; *Delaware R. R. Tax Case*, 18 Wall. 206; *Home Ins. Co. v. New York*, 134 U. S. 594; *Standard U. C. Co. v. Attorney-General*, 46 N. J. Eq. 276; 19 Am. St. Rep. 394. A statute forbidding the payment by life insurance corporations, whether foreign or domestic, of any rebate of premium as an inducement to any person to insure, and declaring any person violating the prohibition guilty of a misdemeanor, is valid. "The corporations organized under the laws of this state for life insurance are absolutely under the direction and control of the legislature. It may specify how and on what terms they may do business, and enact laws regulating their conduct and the conduct of their agents, for their protection and the protection of their policy-holders, and enforce obedience to such laws by such penalties, forfeitures, and punishments as it may, within constitutional limits, prescribe. As all these corporations must act through agents, it has the same power and authority to regulate the conduct of their agents as it has to regulate the corporations themselves. It would be quite preposterous to say that the legislature could, in the exercise of its legitimate authority, regulate these corporations and prescribe the terms under which they may exist and do business, and yet could not by similar laws regulate and control the conduct of their agents. When these corporations seek the benefits and privileges of the laws creating and authorizing them, they must conform to the laws enacted for their conduct, and if they are unwilling to do so, they must go out of existence. So, too, all persons who seek to act as agents of such corporations must conform to the laws regulating the business of such corporations, or cease to act for them": *People v. Formosa*, 131 N. Y. 478; *Commonwealth v. Morningstar*, 144 Pa. St. 103.

Retrospective Effect. — There can be no doubt that the amendment here

under consideration applies to pre-existing statutes as well as to those enacted after its adoption. Though a statute when enacted was constitutional, no proceeding can be taken under it after the adoption of this amendment, the effect of which proceeding, if sustained, must be to deprive some person of a right secured by the amendment against legislative action on the part of any of the states: *Kaukauna v. Green Bay etc. Canal*, 142 U. S. 254.

Burdens and Restrictions Founded on Race. — The general object of the Fourteenth Amendment, and the provisions in the state constitutions of similar import, is to extend to all persons within the jurisdiction of the state the protection of its laws and judicial tribunals on the same terms, and not to permit the granting of privileges to one person to which others of the same class are not entitled, and not to impose upon one person burdens, obligations, or penalties to which others in the same situation are not subjected; and while an individual may often be required to content himself with the privileges granted and to submit to the burdens imposed on all members of the particular class of persons to which he belongs, though some other or all other classes of persons are exempt, yet the classification to which he must thus submit must not be made capriciously, nor directed at a particular class of persons with a view to deprive them of privileges and subject them to burdens merely because they belong to some race or class. So far as the negro race is concerned, the effect of the Fourteenth Amendment is to require that its members be subjected to the same laws, entitled to the same protection, and secured in the same immunities and privileges as members of the white race, and any law depriving any one of a right because of his color is doubtless unconstitutional and void: *Strauder v. West Virginia*, 100 U. S. 303; *Ex parte Virginia*, 100 U. S. 339.

If there is a system of public schools in the state supported by taxation, the children of colored persons cannot, by implication or otherwise, be excluded from the benefits thereof: *Dawson v. Lee*, 83 Ky. 49; nor can the state divide the school funds by appropriating to the support of the schools for white children the moneys received from the property of white persons, leaving for the support of the schools for negroes only such moneys as have been received from property belonging to persons of that race: *Markham v. Manning*, 96 N. C. 132. So far as we are aware, there has been no decision assuring to any member of any race the right to receive his education, or any other privilege to which he is entitled, at the same place or in the same company with members of any other race. The privileges themselves must not be curtailed by law, unless, indeed, it is a curtailment of them to be denied the right to receive them in the midst of members of the other races; and hence a state may provide for separate schools for children of white and of colored races, if the facilities and opportunities for education provided for the one race equal those provided for the other: *People v. Gallagher*, 93 N. Y. 438; 45 Am. Rep. 232; *State v. McCann*, 21 Ohio St. 198; *Cory v. Carter*, 48 Ind. 323; 17 Am. Rep. 738; *Ward v. Flood*, 48 Cal. 36; 17 Am. Rep. 405; and the fact that the children of a colored person may, in a particular case, be compelled to travel farther than white children in the same district to reach a school established for colored children will not entitle them to admission in a school established for whites: *Lehew v. Brummel*, 103 Mo. 546; 23 Am. St. Rep. 895; though doubtless a statute upon the face of which it appeared that this result was sought, or that colored children would be required, as a general rule, to travel farther than whites to reach their schools, would be invalid. Otherwise they might be required

to attend at places so distant from their homes as to effectively prevent their attendance at all.

It appears that colored persons have no constitutional right to ride in the same railway cars with whites, and that railway corporations may voluntarily provide separate cars for the two races, or may be required to do so by state legislation, if the accommodations supplied to the one race equal those supplied to the other: *Louisville etc. R'y Co. v. State*, 66 Miss. 662; 14 Am. St. Rep. 599; *Chesapeake etc. R. R. Co. v. Wells*, 85 Tenn. 613. As to places of amusement, like skating-rinks kept by private persons, and charged with no public duty, their managers may, at their pleasure, admit negroes or not: *Bowlin v. Lyon*, 67 Iowa, 536; 56 Am. Rep. 355; unless there is some statute enacted by the state legislature requiring their admission on the same terms as persons of other races, in which event such enactment is valid, and must be obeyed: *People v. King*, 110 N. Y. 418; 6 Am. St. Rep. 389.

The Liberty of Each Person and his Right to Acquire and Retain Property must always be considered in connection with the rights, liberties, and welfare of others, and each person must submit to such reasonable restrictions as must necessarily be imposed for the better protection of the whole community, and even for the protection of a particular class, and it will hence always be difficult, if not impossible, to define or prescribe any precise test from which to determine with unvarying certainty what restrictions upon the liberties of individuals, or of classes of individuals, are sustainable and what are not. While the courts properly hesitate to formulate definitions of liberty or of due process of law, or to give enumerations of all that may be conceded to one person or denied to another without denying to "any person the equal protection of the laws," yet they have, in some instances, given general descriptions or definitions which, while not intended to be applicable under all circumstances, are usually applicable, and therefore worthy of restatement here. Thus it was said in *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465: "The following propositions are firmly established and recognized: A person living under our constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. The term 'liberty,' as used in the constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." "The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all countries from time immemorial, must therefore be free in this country, to all alike, upon the same conditions. The right to pursue them without let or hindrance, except that which is implied to all persons of the same sex, age, and condition, is a distinguishing privilege of the citizens of the United States, and an essential element of that freedom which they claim as their birthright. . . . Civil liberty exists only where every individual has the power to pursue his own happiness according to his own views, unrestrained, except by equal, just, and impartial laws." *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 757.

General Scope of Fourteenth Amendment. — Mr. Justice Field, in his dis-

senting opinion in *Ex parte Virginia*, 100 U. S. 367, while denying that the operation of the Fourteenth Amendment extended beyond the securing of what he denominated civil rights, said: "And yet the reach and influence of the amendment are immense. It opens the courts of the country to every one, on the same terms, for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts; it assures to every one the same rules of evidence and modes of procedure; it allows no impediments to the acquisition of property and the pursuit of happiness to which all are not subjected; it suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by others; and in the administration of criminal justice it permits no different or greater punishment to be imposed upon one than such as is prescribed to all for like offenses." The same learned jurist, in pronouncing judgment of the court in *Barbier v. Connolly*, 113 U. S. 27, expressed his views upon this subject as follows: "The Fourteenth Amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

Special Privileges and Rules of Law. — Every person must have the right to resort to the courts for redress under substantially the same terms, and no rule of law or of evidence can be applied to one which is not equally applicable to others in controversies of the same character. Hence it has been held that a statute authorizing prosecuting attorneys in criminal cases, at their election, to deprive defendants of the right to the continuance of their case for the purpose of procuring the attendance of witnesses, notwithstanding the use of due diligence, by stipulating that the testimony which it is claimed such witness, if present, would give may be regarded as given by him, is unconstitutional, because under the operation of the statute there may be two persons accused of crime, both of whom have been equally diligent in seeking to procure the attendance of witnesses, one of whom may be forced to trial at the election of the prosecutor without obtaining the advantage of having the jury see and hear and judge of the credibility of his witnesses, while the other, on the prosecutor's making a different election in his case, may receive the benefit of this advantage: *State v. Berkley*, 92 Mo. 41. For similar reasons a statute is unconstitutional which declares that certain acts, if done in a designated river, within the limits of a particular county, shall be regarded as injurious and dangerous, and shall be enjoined without proof that injury or danger has been or will be done them, when the acts are such as may be done without danger or injury, and may be necessary to the enjoyment and protection of private property: *City of Janesville v. Carpenter*, 77 Wis. 288; 20 Am. St. Rep. 123.

A statute is unconstitutional which deprives a person charged with a criminal offense of the presumption of innocence, or makes acts done by certain persons in certain localities criminal, which if done by other persons in different localities are innocent; as where a statute makes the killing of stock on any railroad within specified counties a misdemeanor, for which the president, receiver, and superintendent of the road, and the engineer and conductor in charge of the train, may be indicted, unless the parties indictable shall, within six months after such killing, and before any indictment is preferred, pay the owner of the stock his charges therefor, or if they are deemed too high, submit the question to arbitration: *State v. Divine*, 98 N. C. 778. It has also been held, in Michigan, that a statute authorizing the owner of stock killed by a railroad: *Lafferty v. Chicago etc. R'y Co.*, 71 Mich. 35; *Wilder v. Chicago etc. R'y Co.*, 70 Mich. 382; or a person suing for certain classes of personal services: *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, — to recover, in addition to the damages, or the amount due, an attorney's fee fixed by statute, is class legislation, and therefore void. These Michigan decisions are, however, probably not sustainable, in view of the more recent and authoritative adjudications in the national courts and elsewhere. In all cases where the liability of a railway corporation or of any other person, natural or artificial, results from its or his failure to observe some rule which the legislature of the state was competent to prescribe in the exercise of the police powers vested in it, it may, by way of penalty, impose on the guilty party not only the payment of the attorney's fees of his adversary: *Burlington etc. R'y Co. v. Dey*, 48 N. W. Rep. 98 (Iowa, Feb. 9, 1891); *Perkins v. St. Louis etc. R'y Co.*, 103 Mo. 52; *Peoria etc. R'y Co. v. Duggan*, 109 Ill. 537; but also damages in excess of those suffered. On this ground a statute was sustained which authorized the recovery of double the value of the stock killed, or the damages caused thereto, by a railway, when the injury was inflicted at a point on the road where the corporation had the right to erect a fence, and had failed to do so, and the injury was not occasioned by the willful act of the owner or of his agent: *Minneapolis R'y Co. v. Beckwith*, 129 U. S. 26; *Humes v. Missouri Pac. R'y Co.*, 82 Mo. 221; *Missouri P. etc. R'y Co. v. Humes*, 115 U. S. 512.

Jurors. — In the eyes of the law, white and colored persons are equal, and neither has any right to insist that a person of his race or color shall be on the jury by which he is tried when accused of crime, or when he is otherwise a party to an action or proceeding: *Lawrence v. Commonwealth*, 81 Va. 484; *State v. Sloan*, 97 N. C. 499; *Virginia v. Rives*, 100 U. S. 313. Each has, however, the right to insist that no person be excluded from the jury because of his color or race. Any statute seeking to justify such exclusion is unconstitutional and void: *Strauder v. West Virginia*, 100 U. S. 303; *Virginia v. Rives*, 100 U. S. 313; *Neal v. Delaware*, 103 U. S. 370; and where, in the absence of such statute, or otherwise, it appears that the officer summoning or drawing the jury, grand or petit, has been influenced by considerations of race, and has excluded qualified persons from the jury solely because of their race or color, it has been held that "it would be the duty of the court before which such motion could alone be made in the first instance, on sufficient proof of the facts, to quash such illegally drawn or summoned panel, or any indictment found by such illegally constituted grand jury": *Green v. State*, 73 Ala. 26.

Restrictions on Pursuit of Lawful Business. — One of the rights unquestionably secured to all persons within the jurisdiction of a state is that of following any lawful calling or pursuit, subject only to such conditions and

restrictions as may be imposed for the public welfare, calculated to exclude from the calling persons incompetent to exercise it, or to guard the public from such frauds or impositions as might readily be employed but for some statutory safeguard; but whatever be the nature or object of the imposition or restriction, it must apply to all persons of the same class and condition, or if can be applied to none. "While the power of the legislature to impose restrictions upon the exercise of certain trades and professions for the protection of the public is unquestioned, it must be exercised in conformity with the constitutional requirement that such restrictions must operate equally upon all persons pursuing the same business or profession, under the same circumstances. The constitutionality of a statute cannot be sustained which selects particular individuals from a class or locality and subjects them to peculiar rules, or imposes upon them special obligations or burdens from which others in the same locality or class are exempt. The imposition of special restrictions or burdens or the granting of special privileges to persons engaged in the same business, under the same circumstances, is in contravention of the equal right which all can claim in the enforcement of the laws and in the enjoyment of liberty, and the right of acquiring and possessing property": *State v. Hinman*, 65 N. H. 103; 23 Am. St. Rep. 22; *Soon Hing v. Crowley*, 113 U. S. 703; *Yick Wo v. Hopkins*, 118 U. S. 356. Therefore, those statutes which regulate the practice of dentistry and medicine, and provide what qualifications the practitioners must possess, are valid, if they apply equally to all persons who seek to qualify themselves for or to pursue those callings, or either of them, and are not arbitrary in the conditions which they impose.

A statute making unlawful, in cities of over five hundred thousand inhabitants, the manufacture of cigars, or preparation of tobacco in any form, on any floor, or on any part of any floor, in any tenement-house, if such floor, or any part of such floor, is by any person occupied as a home or residence for the purpose of living, sleeping, cooking, or doing any household work therein, but excepting from the operation of the statute the first floor of any tenement-house on which there is a store for the sale of cigars or tobacco, was also held to be invalid, and void, on the ground that it was arbitrary, because it made unlawful in cities of the class described what was lawful everywhere else in the world, required the occupant of the house either to abandon the trade by which he earned a living for himself and his family or to procure a room elsewhere, "or hire himself out to one who has a room, upon such terms as, under the fierce competition of trade and the inexorable laws of supply and demand, he may be able to obtain from his employer," and because "it is therefore plain that this law interferes with the profitable and free use of his property by the owner or lessee of a tenement-house, who is a cigar-maker, and trammels him in the application of his industry and the disposition of his labor, and thus, in a strictly legitimate sense, it arbitrarily deprives him of his property, and of some portion of his personal liberty": *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636.

The right of every person to pursue any lawful calling without let or hindrance cannot be secured without permitting every person who wishes employment to seek it, and to leave all persons free to accept the services of others on such terms as may be agreed upon by them. Therefore, an ordinance is void which makes it unlawful for a contractor, when having labor performed under a contract with the city, to demand, receive, or contract for more than eight hours' labor in any one day from any person in his employ or under his control, with the promise or understanding that such

person so laboring over eight hours shall receive a sum for a day's work more than that paid for a legal day's work, or to employ any Chinese labor to be used in performing such contract with the city: *Ex parte Kuback*, 85 Cal. 274; 20 Am. St. Rep. 226.

Arbitrary Tests, What are. — An arbitrary test would be one "having no reference to skill, learning, or fitness for the practice of the profession" to which it was applied; as where all persons desiring to practice dentistry are required to have received a dental degree from some college, or a license from a dental society, excepting such persons as have resided or practiced their profession in the town or city of their present residence since January 1, 1875: *State v. Hinman*, 65 N. H. 103; 23 Am. St. Rep. 22. A test is also arbitrary if it is one which is not definite or prescribed by law, and in the application of which the officer to whom its enforcement is committed can find no guide in the law, and may therefore lawfully permit the applicant to carry on business for such reason as to the officer may seem proper, or may lawfully grant a permit to one person while he denies it to another equally well qualified to carry on the business. Therefore, a municipal ordinance which prohibits the carrying on of a laundry by any person within the limits of a city "without having first obtained the assent of the board of supervisors, except the same be located in a building constructed either of brick or of stone," is void, because, "if the applicant for such consent, being in every way a qualified and competent person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by *mandamus* to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them the authority to withhold their assent without reason and without responsibility. The power given them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint": *Yick Wo v. Hopkins*, 118 U. S. 358.

Arbitrary Restrictions, Illustrations of. — The following are further illustrations of statutes and ordinances invalid because of their being arbitrary, or imposing restrictions upon or granting privileges to one or more persons to which other persons in the same condition are not entitled and subject: A statute making it unlawful for barbers to keep open their bath-rooms on Sundays while all other persons remained at liberty to keep theirs open: *Ragio v. State*, 86 Tenn. 272; a statute granting to a single corporation the right to take a greater rate of interest than any other person, natural or artificial, is allowed to exact: *Gordon v. Winchester Building Ass'n*, 12 Bush, 110; an ordinance requiring persons whose principal place of business is not in a city designated to obtain an annual license and pay two hundred dollars before selling or offering to sell any merchandise by sample or representation in such city to any person other than persons living in or doing business in the city, while persons doing business within the city, though required to obtain a license, were entitled to have the amount which they must pay therefor regulated by the amount of business done by them: *Fecheimer v. Louisville*, 84 Ky. 306; *Walling v. Michigan*, 116 U. S. 446; a statute making criminal the violation of a labor contract by either party thereto, but imposing a more severe punishment upon a guilty employee than upon a guilty employer: *State v. Williams*, 32 S. C. 123; a statute attempting to restrict the damages recoverable in certain cases of newspaper libel to such as plaintiff might show "he has suffered in respect to his property, business, trade,

profession, or occupation," and the result of which must have been to provide a complete immunity in slandering persons who were without property, and were not engaged in any business, trade, or occupation: *Park v. Detroit Free Press Co.*, 72 Mich. 560; 16 Am. St. Rep. 544.

The Liberty of Making Contracts is absolutely essential to the acquisition, retention, and enjoyment of property, and still it must necessarily be subject to such restraints as will prevent the enforcement of contracts which are illegal, immoral, or against public policy, and protect infants and persons of unsound mind against engagements to which a more mature or sound mind might not assent; and there are also many classes of persons over which others have a great opportunity to exercise fraud, oppression, and imposition, and the law may doubtless interpose safeguards against such exercise, and may perhaps absolutely nullify contracts of such character, and make under such conditions as are likely to be the consequence of fraud, imposition, or oppression. On the other hand, the legislature cannot interpose arbitrary and unreasonable restrictions, nor make those contracts criminal or unlawful which are necessarily innocent in purpose.

Statutes enacted in some of the states for the purpose of preventing merchants from offering to give or giving any article as a gift, prize, premium, or reward to the person purchasing some other article have been assailed as arbitrary infringements upon the right to contract and to do business. In Maryland, a statute of this character was sustained without any apparent consideration of the question whether or not it conflicted with the Fourteenth Amendment: *Long v. State*, 73 Md. 527; *ante*, p. 606; while in New York, a similar enactment was denounced as in violation of the clause of the state constitution providing that "no person shall be deprived of life, liberty, or property without due process of law," and as not being an authorized exercise of the police power of the state: *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465. A like contrariety of opinion has resulted from statutes enacted with a view to protecting certain classes of employees from the supposed opportunity of their employers to impose upon them and oppress them by paying their wages otherwise than in money, or by selling them supplies at a greater price than was charged for like supplies when sold to other persons. A statute of Maryland enacted in 1880 provided that every corporation engaged in manufacturing, or in operating a railroad, in Allegbeny County, and employing ten hands or more, should pay its employees the full amount of their wages in legal-tender money of the United States, and that any contract by or in behalf of such corporation for the payment of any part of such wages in any other manner shall be and is illegal and void, and every such employee shall be entitled to receive from any such corporation the whole or so much of the wages earned by him as shall not have been actually paid him in legal-tender money of the United States, without set-off or deduction, of his demand in respect to any account or claim whatever, and that the making of any contract forbidden in the statute shall be an indictable offense. This statute was sustained, as against the corporation resisting it, on the ground that as the legislature had the right at any time to alter or amend its charter at pleasure, it could forbid its paying its employees otherwise than in money, and making contracts for such payment: *Shaffer v. Union M. Co.*, 55 Md. 74. A statute making void contracts whereby employees agreed in advance to accept payment in anything else than money for services to be rendered by them was also sustained in Indiana: *Hancock v. Yaden*, 121 Ind. 366; 16 Am. St. Rep. 396. On the other hand, the judiciary of the states of Illinois, Pennsylvania, and

West Virginia have regarded every attempt by the legislatures of those states to make void contracts or other dealings between employers and employees as "infringements alike on the right of the employer and the employee, as insulting attempts to put the laborer under legislative tutelage, which is not only degrading to his manhood, but subversive to his rights as a citizen of the United States": *Millett v. People*, 117 Ill. 294; 57 Am. Rep. 869; *God-charles v. Wigeman*, 113 Pa. St. 431; *State v. Goodwill*, 33 W. Va. 179; *ante*, p. 863; *State v. F. C. Coal etc. Co.*, 33 W. Va. 188; *post*, p. 891. This interesting question has not yet been settled by the adjudications of the national courts. To us it seems that the existence of a necessity of protecting certain classes of employees from oppression and imposition by their employers, and the means by which that necessity shall be met, if found to exist, are questions within the police power of the several states, and that when they, in the assumed exercise of that power, determine that such necessity does exist, and devise measures calculated to overcome or mitigate it, their action is not annulled by the Fourteenth Amendment.

Police Power and the Fourteenth Amendment.—In determining whether or not an enactment infringes upon the Fourteenth Amendment by abridging privileges or immunities of a citizen of the United States, we must inquire whether the alleged privilege or immunity which it abridges or destroys is such as was possessed by citizens of the United States before the adoption of the amendment. When, however, the enactment is assailed on the ground that it deprives some person or class of persons of liberty or property without due process of law, or denies to some person or class of persons the equal protection of the laws, the effect of the amendment must be considered in connection with the police power of the state; for it is settled beyond further judicial controversy that these inhibitions do not limit, and were not "designed to limit, the subjects upon which the police power of the state may be exerted": *Barbier v. Connolly*, 113 U. S. 27; *Minneapolis R'y Co. v. Beckwith*, 129 U. S. 29; *Mugler v. Kansas*, 123 U. S. 663. On the other hand, it is equally certain that the legislature cannot, by assuming to exercise the police power, act upon subjects which do not and cannot fall within its dominion, nor impose restrictions or create or enforce discriminations which are not in the legitimate exercise of that power; and that while the judgment of the legislature is accepted upon doubtful subjects: *Powell v. Commonwealth*, 114 Pa. St. 265; 60 Am. Rep. 350; *State v. Moore*, 104 N. C. 744; 17 Am. St. Rep. 696; yet the courts must, in others, overrule it, and refuse to sustain, as exercises of the police power, enactments not sanctioned by it: *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465.

The Police Power "is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the state, necessary for the public welfare. The existence of this power is universally recognized. All property, all business, every private interest, may be affected by it and be brought within its influence. Under this power, the legislature regulates the uses of property, prescribes rules of personal conduct, and in numberless ways, through its pervading and ever-present authority, supervises and controls the affairs of men in their relations to each other and to the community at large, to secure the mutual and equal rights of all, and promote the interests of society. It has limitations; it cannot be arbitrarily exercised so as to deprive the citizen of his liberty or property. But a statute does not work such a deprivation in the constitutional sense simply because it imposes burdens or abridges freedom of action, or regulates occupations, or subjects individuals or property to restraints

in matters indifferent, except as they affect public interests or the rights of others. Legislation under the police power infringes the constitutional guaranty only when it is extended to subjects not within its scope and purview as that power was defined and understood when the constitution was adopted. The generality of the terms employed by jurists and publicists in defining this power, while they show its breadth and the universality of its presence, nevertheless leave its boundaries and limitations indefinite, and impose upon the court the necessity and duty, as each case is presented, to determine whether the particular statute falls within or outside of its appropriate limits": *People v. Budd*, 117 N. Y. 1; 15 Am. St. Rep. 460; *State v. Moore*, 104 N. C. 714; 17 Am. St. Rep. 696.

Under the definition given of the police power, that it is the authority residing in every sovereignty to pass laws "for the internal regulation and government of the state, necessary for the public welfare," and the judicial concession that this power is not impaired by the Fourteenth Amendment, there is grave danger that that amendment will become irretrievably lost within the illimitable or indescribable boundaries of the police power. Furthermore, it is conceded that all doubtful questions are to be resolved in favor of the police power: *State v. Moore*, 104 N. C. 744; 17 Am. St. Rep. 696; and that not only does the police power confer upon each state the right to legislate for the public welfare and the preservation of the public health, safety, and morals, but that the power of determining what will injuriously affect either is also primarily vested in the state. "Power to determine such questions, so as to bind all, must exist somewhere, else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system, that power is lodged with the legislative branch of government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety": *Mugler v. Kansas*, 123 U. S. 660. We do not assert that any decision has held the legislative determination conclusive, but merely that it must, if the power to determine at all be conceded, be conclusive, unless the statute enacted apparently or professedly to accomplish some of the legitimate objects of the police power "has no real or substantial relation to those objects": *Mugler v. Kansas*, 123 U. S. 661. Manifestly, it is only in extreme cases that the judiciary will, with respect to a matter which it concedes a co-ordinate branch of the government had power, primarily, to determine, overrule, and set at naught the determination there made, when to do so it must, in substance, declare that such determination was in effect a sham, a mere pretense, — a legislative decision which had no real or substantial relation to the objects in furtherance of which it was professedly pronounced. Whenever it is claimed that the grant of a special privilege, or the imposition of a special burden or restriction, must be disregarded, because in violation of the Fourteenth Amendment, we must inquire whether it is one which the legislature might have granted or imposed in good faith, in an honest desire to promote the public morals, health, safety, or welfare, and if so, it can rarely, if ever, be declared void because of this amendment.

Local and Special Legislation, otherwise valid, and not directed against any particular race or nationality, is not invalidated by the Fourteenth Amendment: *Missouri R'y Co. v. Muekey*, 127 U. S. 209; *Dent v. West Virginia*, 129

U. S. 114; *Bell's Gap Road Co. v. Pennsylvania*, 134 U. S. 237; *State v. Schlemmer*, 42 La. Ann. 1166; *Barbier v. Connolly*, 113 U. S. 27, and whether it is intended to operate against one race or nationality, rather than against another, or is otherwise prohibited by the amendment, must be determined from an inspection of the statute, because "the rule is general with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts or inferable from their operation, considered with reference to the conditions of the country and existing legislation. The motives of the legislators, considered as to the purposes they had in view, will always be presumed to be to accomplish that which follows as a natural and reasonable effect of their enactments": *Soon Hing v. Crowley*, 113 U. S. 703. It is no objection to a statute that it is special or local, "if all persons subject to it are treated alike under similar circumstances and conditions in respect both to the privileges conferred and the liabilities imposed": *Missouri R'y Co. v. Mackey*, 127 U. S. 209; *Missouri v. Lewis*, 101 U. S. 22; *Hayes v. Missouri*, 120 U. S. 68. Therefore the following special legislation has been sustained: A statute subjecting railway corporations whose tracks have not been fenced to double damages for injuries to animals on such tracks: *Missouri Pac. R'y Co. v. Humes*, 115 U. S. 512; *Minneapolis & St. L. R'y Co. v. Beckwith*, 129 U. S. 26; or applying to municipal corporations and giving them privileges to which private persons or corporations, or even other municipal corporations, are not entitled: *Preston v. Louisville*, 84 Ky. 118; providing that in prosecutions for crime in cities having a population of more than five hundred thousand inhabitants the state shall be allowed fifteen peremptory challenges to jurors, while elsewhere it is allowed but eight: *Hayes v. Missouri*, 120 U. S. 68; local-option laws which restrict the sale of intoxicating liquors in such cities as may adopt them by a majority vote: *Ex parte Swann*, 96 Mo. 44; municipal ordinances prohibiting the carrying on of public laundries within certain prescribed limits in a city from ten o'clock at night until six o'clock in the morning: *Barbier v. Connolly*, 113 U. S. 23; a statute giving miners or others employed in or about coal mines a prior lien on mining property for work and labor, and land-owners a prior lien for royalty: *Warren v. Sohn*, 112 Ind. 213; or dispensing with undertakings in proceedings by attachment, when the defendants are non-residents: *Head v. Daniels*, 38 Kan. 1; or with the signature of a wife who is not and has never been a resident of the state to a conveyance by her husband of property, in effect releasing her right to dower by such conveyance, though had she been a resident her signature would have been indispensable: *Buffington v. Grosvenor*, 46 Kan. 730; making every railway corporation organized and doing business in the state liable for damages done to any employee of such company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employees to any person sustaining such damage: *Missouri Pac. R'y Co. v. Mackey*, 127 U. S. 205; *Minneapolis etc. R'y Co. v. Herrick*, 127 U. S. 210; *Pierce v. Central I. R'y Co.*, 73 Iowa, 140; *Rayburn v. Central I. R'y Co.*, 74 Iowa, 637; creating a presumption of negligence against railway corporations, when damage has been done by fire or other means: *Missouri Pac. R'y Co. v. Merrill*, 40 Kan. 404; *Augusta etc. R. R. Co. v. Randall*, 79 Ga. 304; excluding the defense of contributory negligence when injuries have resulted from the failure of railway corporations to fence their tracks: *Quackenbush v. Wisconsin etc. R'y Co.*, 62 Wis. 411; *Curry v. Chicago etc. R'y Co.*, 43 Wis. 665; or their failure to give signals or warnings when approaching crossings: *Kaminitzky v. Northeastern*

R. R. Co., 25 S. C. 53; punishing employees of railway corporations for mutilating, disfiguring, burning, hauling off, or burying any dead carcass of any animals that shall be killed by any railway in the state without first notifying two citizens of the neighborhood: *Bannon v. State*, 49 Ark. 167; declaring that any person having in his possession Texas cattle shall be liable for any damages that may accrue from allowing such cattle to run at large and thereby spreading the disease among other cattle, known as "Texas fever," and also subjecting him to fine and imprisonment: *Kimmish v. Ball*, 129 U. S. 217; exempting growers of tobacco or purchasers thereof who pack the same in the county or the neighborhood where it was grown from having it opened and inspected before being exported from the state, if they have first marked it with the full name of the owner and place of his residence, though other persons are required to submit to such opening and inspection: *Turner v. Maryland*, 107 U. S. 38; affirming 55 Md. 240; restricting the amount of land which may be cultivated by one family or household within the limits of a municipal corporation: *Town Council v. Pressly*, 33 S. C. 56.

Special Punishment for Crimes.—"The Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty, or property, and in the administration of criminal justice requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses, but it was not designed to interfere with the power of the state to protect the lives, liberty, or property of its citizens, nor with the exercise of that power in the adjudication of the courts of the state in administering the process provided by the law of the state": *In re Converse*, 137 U. S. 624; *Leeper v. Texas*, 139 U. S. 462. Nor is it universally true, as stated in this quotation, that no higher punishment can be "imposed upon one than is imposed on all for like offenses." Not only may the state prescribe different punishments for different acts constituting the same offense in different degrees or by different classes of persons: *Ex parte Garza*, 28 Tex. App. 381; 19 Am. St. Rep. 845; but it may doubtless provide that a person who has been before convicted of crime may suffer a more severe punishment than for a first offense against the law: *In re Boggs*, 45 Fed. Rep. 475; and that minors below a specified age shall not be subject to the death penalty, though their crime, if committed by an adult, would be rewarded by that punishment: *Ex parte Walker*, 28 Tex. App. 246. A statute is not invalid because it punishes adultery between persons of different races more severely than if they belonged to the same race: *Pace v. Alabama*, 106 U. S. 583.

Taxation.—The Fourteenth Amendment has not impaired the power of each state to select the subjects of taxation and provide the modes of assessment and collection. The different classes of property may be subject to different modes and degrees of taxation. No one has a right to insist that no property shall be exempt, or that the value of all property shall be ascertained in the same manner, or subject to the same mode or amount of taxation: *Charlotte etc. R. R. Co. v. Gibbs*, 142 U. S. 386; *The Delaware R. R. Tax*, 18 Wall. 206; *Maine v. Grand Trunk R'y Co.*, 142 U. S. 217; *State R. R. Tax Cases*, 92 U. S. 575; *Kentucky R. R. Tax Cases*, 115 U. S. 321. If the uses to which any particular class of property is devoted are such that it must be specially benefited by some service rendered by the government, or some department thereof, the expenses of such service may be imposed upon it. Hence a statute providing for a state railway commission, and that the salary of its members shall be borne by the several companies operating railways within the state, is not invalid: *Charlotte etc. R. R. Co. v. Gibbs*, 142 U. S. 386. So persons carrying on various occupations may be required to take out a

license and pay a fee therefor; and what persons shall be required to submit to the payment of such fee, and the amount and terms of payment, and modes of collection are subjects for the determination of the state legislature; and the fact that the legislature has imposed a greater burden upon some corporations than upon others, or has burdened some and left others free, is not a valid objection to the statute, provided there is no arbitrary discrimination between persons situated in the same circumstances, and no unlawful interference with interstate commerce: *Bostick v. State*, 47 Ark. 126; *Fahey v. State*, 27 Tex. App. 146; *Rothermel v. Meyerle*, 136 Pa. St. 250; *State v. Wessell*, 109 N. C. 735; *State v. Smithson*, 106 Mo. 149; and merchants, in addition to an *ad valorem* tax on their stock, may be required to pay a tax equivalent to one tenth of one per cent of the total amount of their purchases, excepting purchases of farm products, from their producers: *State v. French*, 109 N. C. 722. The views of the supreme court of the United States concerning the effect of the Fourteenth Amendment upon the right of the states to impose and collect taxes and licenses was thus clearly and forcibly expressed by the late Mr. Justice Bradley, delivering the opinion of the court in *Bell's Gap Road Co. v. Pennsylvania*, 134 U. S. 237: "The provision in the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution; but clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice, and which every state, in one form or another, deems it expedient to adopt."

Judicial Proceedings. — Nor does the Fourteenth Amendment entitle every person to have the same remedies in the courts, or to pursue them within the same times or in the same modes, as every other person, though in these respects the same rights and remedies must be conceded to all persons in the same condition and circumstances. If a litigant's cause comes on to be tried before a court then presided over by a judge *de facto*, he cannot avoid the judgment against him on the ground that causes in other courts of the state

were decided only by judges *de jure*: *In re Manning*, 139 U. S. 504; nor can he object that his cause happened to belong to a class or to be tried before a court from the decision of which no appeal was allowed, though had it belonged to a different class or fallen within the jurisdiction of a different court, remedies by appeal would have been open to him: *Sullivan v. Haug*, 82 Mich. 548; *St. Louis etc. R'y Co. v. Worthen*, 52 Ark. 529; *Missouri v. Lewis*, 101 U. S. 22; or that in the city where he was tried and convicted of crime, the state was entitled to fifteen peremptory challenges of jurors, and elsewhere to but eight: *Hayes v. Missouri*, 120 U. S. 68; or that a statute limited to ninety days the time within which suit could be brought in a cause of action such as that upon which he sought to recover: *Christy v. Life Indemnity & Ins. Co.*, 48 N. W. Rep. 94 (Iowa, Feb. 10, 1891); or that a statute provided that cases such as his should be tried without a jury: *Walker v. Sauvinet*, 92 U. S. 90; or after a debt due from him had become barred by the statute of limitations, had repealed the statute and thereby revived the remedies against him, and authorized the judgment of which he complained: *Campbell v. Holt*, 115 U. S. 620.

Establishing Markets and Otherwise Regulating the Modes and Places of doing Business. — Each state legislature may, when justified by the police power vested in it, restrict the places and modes of doing business, though in so doing it, in some respects, creates a monopoly. Thus it may forbid the landing and slaughtering of animals whose flesh is intended for food, within a certain city and adjacent parishes, except within certain designated localities, and forbid the keeping or establishing of slaughter-houses within those limits, except by a corporation created by the statute, and may give to such corporation the exclusive privilege of carrying on a live-stock landing and slaughter-house business within those limits, but making it the duty of the corporation to permit any person to slaughter animals in its slaughter-houses. This statute was defensible as an exercise of the police power, because it regulated an unwholesome trade necessary to be carried on in the midst of a dense population, which, unless regulated, might, and probably would, be made offensive to the senses and injurious to the health of the community; *Slaughter House Cases*, 16 Wall. 36. "The regulation and control of markets for the sale of provisions, including the places and distances from each other at which they may be kept, are matters of municipal police power, and may be enforced by the legislation of the city council, to be exercised as, in its discretion, the public health and convenience may require": *Natal v. Louisiana*, 139 U. S. 64. A statute may make it criminal for any person to vend refreshments at a camp-meeting without the consent of the persons in charge thereof, but exempting from its operation persons having a regular place of business where such meeting is held: *Meyers v. Baker*, 120 Ill. 567. Business may be regulated so as not to be offensive to decency: *Nolin v. Franklin*, 4 Yerg. 163; or as not to create or constitute a nuisance in other respects; and, if necessary, property, the use of which is a public nuisance, may be authorized to be destroyed: *Watertown v. Mayo*, 109 Mass. 315; *Taylor v. State*, 35 Wis. 298; *Mugler v. Kansas*, 123 U. S. 623; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659. In Pennsylvania, it has been decided that a statute authorizing the sale of certain articles by hawkers or peddlers relates to the manner of sale, and not to the right of sale, and was sustainable as an exercise of the police power: *Commonwealth v. Gardner*, 133 Pa. St. 284; 19 Am. St. Rep. 645.

Rules and Restrictions to Prevent Imposition and Fraud. — If a business is of a character offering special opportunities for imposition and fraud or render-

ing imposition and fraud specially difficult of detection or redress, it is unquestionably within the power of the state to impose such regulations and restrictions as to its legislature may seem proper for the better protection of its citizens and others, unless, indeed, the restrictions imposed are of a capricious and arbitrary character, such as could not have been enacted in good faith. Therefore a statute is not subject to constitutional objection which provides that tobacco shall not be carried out of the state unless packed in a designated manner, in hogsheads of a particular size, and either opened and submitted to inspection by a public official, or if packed by the grower or purchaser thereof in the same county or neighborhood where grown, marked with the full name of the owner and his place of residence: *Turner v. State*, 55 Md. 240; 107 U. S. 38; or that it shall be unlawful to sell, deliver, or receive any cotton in the seed in less quantity than one bale, unless the sale is in writing, signed by the parties thereto, witnessed by two witnesses, and the writing delivered, with a fee, to the nearest justice of the peace, to be docketed for the inspection of all persons: *State v. Moore*, 104 N. C. 714; 17 Am. St. Rep. 696; or places the sale of fertilizers under the control of a commissioner of agriculture, who is authorized to make analysis of all fertilizers offered for sale in the state, to issue and distribute circulars setting forth the price of fertilizers sold or offered for sale, their analysis as claimed by the manufacturer or dealer in them, to provide tags for attachment to bags, barrels, and packages of fertilizers, which shall be printed, and the word "guaranteed," with the year or season in each year in which they are to be used, and prohibiting the sale or exchange of fertilizers without a license from such commissioner: *Steiner v. Ray*, 84 Ala. 95; 5 Am. St. Rep. 332; or prohibiting the manufacture of oleomargarine, or any other substance or compound other than that produced by unadulterated milk or cream from such milk, designed to take the place of butter or cheese produced from pure milk or cream: *Waterbury v. Newton*, 50 N. J. L. 534; *Powell v. Pennsylvania*, 127 U. S. 678; *State v. Marshall*, 64 N. H. 549; *Butler v. Chambers*, 36 Minn. 69; 1 Am. St. Rep. 638; or prohibiting the sale of milk adulterated with pure water, or otherwise, and fixing a standard, and declaring that all milk below that standard is impure or adulterated: *Commonwealth v. Waite*, 11 Allen, 264; 87 Am. Dec. 711; *State v. Campbell*, 64 N. H. 402; 10 Am. St. Rep. 419; *State v. Smyth*, 14 R. I. 100; 51 Am. Rep. 344; or requiring persons selling patent rights to file with the clerk of the county an authenticated copy of the letters patent, and an affidavit that they are genuine and have not been revoked, and that the affiant is authorized to sell the right patented: *Brechbill v. Randall*, 102 Ind. 528; 52 Am. Rep. 695; or requiring operatives of butter and cheese factories on the co-operative plan to give bonds for the faithful accounting of property received by them: *Hawthorn v. People*, 109 Ill. 302; 50 Am. Rep. 610.

Fixing Rates to be Charged for Services. — Over no subject has litigation been more persistent than that of the right of the legislature to prescribe rates to be charged for services rendered by carriers and others engaged in businesses which are regarded as charged with public use, or "affected with a public interest." It would, we think, be impossible, from existing decisions, to form any reliable test by which to determine in all cases whether the business in question is or is not such as is charged with a public use, or "affected with a public interest" so as to bring it within the power of the legislature to prescribe the charges which may lawfully be made therein. If the business is one which it is not lawful to carry on without a franchise or license from the state, or is rendered especial assistance by the state, by taxation or

otherwise, or is allowed the use of public property or of some public easement, or is granted some exclusive privilege by the state or the public, its charges may be fixed by the legislature: Cooley's Constitutional Limitations, 6th ed., 738. We apprehend, however, that the power of the legislature, though usually exercised over businesses such as we have just referred to, is not limited to them, and may be extended to all cases in which the business is one which is carried on under such circumstances as to create a substantial monopoly or to give special opportunities for extortion or oppression: *People v. Budd*, 17 N. Y. 1; 15 Am. St. Rep. 460; affirmed *Budd v. New York*, 143 U. S. 517; *Sinking Fund Cases*, 99 U. S. 700; *Spring Valley etc. Co. v. Schottler*, 110 U. S. 347; *Dow v. Beidelman*, 125 U. S. 680, 686. At all events, the exercise of this power has been sustained as against common carriers: *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307; *Chicago etc. R'y Co. v. Iowa*, 94 U. S. 155; *Ruggles v. Illinois*, 108 U. S. 526; *Railroad Co. v. Maryland*, 21 Wall. 456; *Dow v. Beidelman*, 49 Ark. 455; warehousemen: *Stone v. Yazoo etc. R. R. Co.*, 62 Miss. 607; 52 Am. Rep. 193; *Delaware etc. R. R. Co. v. Central Stock Yard*, 45 N. J. Eq. 50; corporations authorized to manufacture and sell illuminating gas: *State v. Columbus Gas Co.*, 34 Ohio St. 572; 32 Am. Rep. 390; *Zanesville v. Gas Light Co.*, 47 Ohio St. 1; or to use, rent, and maintain telephones, and the wires and appliances necessary thereto: *Chesapeake & P. T. Co. v. Baltimore etc. Tel. Co.*, 66 Md. 399; 59 Am. Rep. 167; *Hockett v. State*, 105 Ind. 250; 55 Am. Rep. 201; *Central U. T. Co. v. State*, 118 Ind. 194; 10 Am. St. Rep. 114; *Central U. T. Co. v. Bradbury*, 106 Ind. 1; *Webster Telephone Case*, 17 Neb. 126; 52 Am. Rep. 404; and persons, whether natural or artificial, engaged in the business of elevating, receiving, and discharging grain: *Munn v. Illinois*, 94 U. S. 113; *People v. Budd*, 117 N. Y. 1; 15 Am. St. Rep. 460; affirmed 143 U. S. 517. We had understood *Chicago etc. R'y Co. v. Minnesota*, 134 U. S. 418, as in effect overruling the earlier decisions upon the same subject, and determining that a common carrier or other person could not be prevented from showing in some appropriate judicial tribunal that the charges fixed for his services were unreasonable, and thereby relieving himself from the obligation to conform to such charges. A more recent decision, though by a divided court, has limited the apparent signification of the former decision by restricting its application to cases in which the rates and charges were not fixed by the legislature itself, but by some commission or other tribunal to which the legislative authority has been delegated, and has reaffirmed *Munn v. Illinois*, and the other cases in harmony with it: *Budd v. New York*, 143 U. S. 517.

Regulations and Restrictions to Promote and Secure the Public Health and Safety are also within the police power of the state and may extend to a protection both of person and of property. In cities and other places of dense population, what is known as "fire limits" may be fixed, and the construction, alteration, and repair of wooden and other specially combustible buildings there prohibited: *Respublica v. Duquet*, 2 Yates, 493; *Wadleigh v. Gilman*, 12 Me. 403; 28 Am. Dec. 188; *Monroe v. Hoffman*, 29 La. Ann. 651; 29 Am. Rep. 345; *King v. Davenport*, 98 Ill. 305; 38 Am. Rep. 89; *Ex parte Fiske*, 72 Cal. 125; the right to store gunpowder and other explosive and dangerous material may be confined to certain limits, where the harm which may be produced by them will be reduced to the minimum: *Foote v. Fire Department*, 5 Hill, 99; *Davenport v. Richmond*, 81 Va. 636; the sale of poisons may be forbidden unless they are labeled so as to give warning of their character and effect: *Morey v. Brown*, 42 N. H. 373; a bicycle or other vehi-

cle which from its form, appearance, or manner of use may frighten horses, and thereby imperil the lives of people, may be excluded from the public highway: *State v. Yopp*, 97 N. C. 477; 2 Am. St. Rep. 305; railroad corporations may be required to fence their tracks and put on cattle-guards: *Wilder v. Maine etc. R. R. Co.*, 65 Me. 322; 20 Am. Rep. 698; *Thorpe v. Rutland R. R. Co.*, 27 Vt. 140; 62 Am. Dec. 625; or to keep that part of the country within the lines of their right of way safe and convenient for travelers upon it: *Boston etc. R. R. Co. v. County Commissioners*, 79 Me. 386; *People v. Boston & A. R. R. Co.*, 70 N. Y. 569; and to that end to keep in repair suitable crossings, where railways intersect public highways: *State v. Chicago etc. R. R. Co.*, 29 Neb. 412; to require locomotive-engineers and other persons in the employment of railway corporations whose duties call for ability to distinguish between colors to be examined in this respect and that such corporations pay for the expenses of such examination: *Nashville etc. R'y Co. v. Alabama*, 128 U. S. 96.

Statutes Regulating the Practice of Dentistry and of Medicine, providing means of securing the competency of persons engaged therein, and excluding all other persons from such practice, are defensible, both on the ground that they are in the interest of the public health and are designed and well calculated to protect the public from imposition and fraud. They have never been pronounced invalid, except when they imposed arbitrary discriminations between persons equally well qualified to engage in the profession to which such statute applied: *Wilkins v. State*, 113 Ind. 514; *State v. Dent*, 25 W. Va. 1; *Harding v. People*, 10 Col. 387; *People v. Phippin*, 70 Mich. 6; *State v. Green*, 112 Ind. 462; *Dent v. West Virginia*, 129 U. S. 114. And they are not deemed arbitrary because they exempt from their prohibitions midwives and non-resident physicians coming within the state to consult with resident registered physicians: *State v. Van Doran*, 109 N. C. 864.

Statutes Restricting Sales of Intoxicating Liquors. — The right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States, and is not assured by that portion of the Fourteenth Amendment prohibiting the abridging of such privileges and immunities: *Bartemeyer v. Iowa*, 18 Wall. 129; nor is there elsewhere in that amendment any protection for the liquor traffic. In the legislature is vested the authority to determine whether the manufacture or sale of particular drinks will injuriously affect the public, and they may therefore regulate, restrict, or prohibit the manufacture or the sale of intoxicating liquors, unless perhaps when used for medical purposes: *Beer Co. v. Massachusetts*, 97 U. S. 25; *Foster v. Kansas*, 112 U. S. 201; *Mugler v. Kansas*, 123 U. S. 623. When the sale of such liquors is permitted, the right to sell them may be restricted to such classes of persons as the legislature may think proper. Hence this right may be confined to male inhabitants of a state: *Blair v. Kilpatrick*, 40 Ind. 315; *Welsh v. State*, 126 Ind. 71; or to citizens of the United States of temperate habits and good character: *Trageser v. Gray*, 73 Md. 250; *ante*, p. 587; and a person convicted of intoxication may be compelled to disclose, "under oath, when, where, how, and from whom he procured the liquor by which his intoxication was produced," and his refusal to make such disclosure may be punished as a contempt of court: *In re Clayton*, 59 Conn. 510; 21 Am. St. Rep. 128.

STATE v. FIRE CREEK COAL AND COKE COMPANY.

[33 WEST VIRGINIA, 188.]

CONSTITUTIONAL LAW — EMPLOYERS AND EMPLOYEES. — A statute declaring that it shall be unlawful for any person, firm, or corporation engaged in mining or manufacturing, and interested in merchandising, to knowingly and willfully sell any merchandise or supplies to any employee at a greater per cent of profit than when selling merchandise or supplies of like quality, character, and quantity to other customers buying for cash, and not employed by them, is void, because it is class legislation, and an unjust interference with the rights, privileges, and property of both the employer and the employee.

J. W. St. Clair, for the plaintiff in error.

Alfred Caldwell, attorney-general, for the defendant in error.

SNYDER, P. Writ of error to a judgment of the circuit court of Fayette County, pronounced on September 29, 1887, upon an indictment against the Fire Creek Coal and Coke Company, a domestic corporation. There was a motion to quash and a demurrer to the indictment, each of which was overruled, a trial by jury and conviction, and a fine of twenty-five dollars imposed upon the defendant. The indictment is under the provisions of the fourth section of chapter 63, Acts of 1887, which provides, in substance, as follows: That it shall be unlawful for any person, firm, company, corporation, or association engaged in mining or manufacturing, and who shall be interested in merchandising, to knowingly and willfully sell any merchandise or supplies whatsoever to any employee at a greater per cent of profit than merchandise and supplies of the like character, quality, and quantity are sold to other customers buying for cash, and not employed by them. The violation of this section is made a misdemeanor, punishable by a fine not exceeding one hundred dollars and not less than twenty-five dollars.

In *State v. Goodwill*, 33 W. Va. 179, ante, p. 863, this court held it is not competent for the legislature, under the constitution, to single out owners and operators of mines, and manufacturers of every kind, and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. Such legislation cannot be sustained as an exercise of the police power. And we also held in that case that the third section of the same act, under which the indictment now under consideration is founded is unconstitutional and

void. In that case we referred to the constitutional provisions, both state and federal, and reviewed at some length the decisions of the courts in respect to the power of the legislature to enact laws such as the one here in question. The provision of the statute which we declared invalid in that case was an attempt to prohibit persons engaged in mining and manufacturing from issuing for the payment of labor any order or paper, except such an order as is specified in the act. The chief ground upon which we held that section void was, that it discriminated against a class of employers, and interfered with the right of contract between citizens in respect to matters purely private.

That section of the act having been held void as an abridgment of the guaranteed rights and privileges of the citizens of this state, it seems to me that the fourth section of the same act—the one now in question—must, for the reasons and upon the authorities and principles set forth in the opinion in the said case of *State v. Goodwill*, 33 W. Va. 179, *ante*, p. 863, be also held unconstitutional and void. There are many considerations for selling goods or supplies at a less per cent of profit to one customer than to others. The goods may be of the “like character, kind, quality, and quantity,” and still there may be considerations, entirely proper, why the sale should not be at the same price in all cases,—such as the character and promptness of the customer, the risk of loss or time of payment, the aggregate amount of purchases by the same person of different kinds of goods or supplies. It may be more profitable to sell a large bill of different kinds of goods to a large consumer than to sell one of the same kind of articles to one who buys nothing else.

The statute is a procrustean bed. It consigns all sizes and conditions to the same measure of treatment, regardless of their differences. It excludes all freedom in trade and all considerations of mutual benefit, and even charity. If the employer sells goods to the family of some friend in indigent circumstances at less than cost, then, under this statute, he must sell at the same price to all his employees. But it is unnecessary to illustrate the vices, the crudities, and the injustice of the statute. That it is an attempt to do for private citizens, under no physical or mental disabilities, what they can best do for themselves, is apparent. It selects miners and manufacturers as a class, and denies to them privileges which are not only proper and legitimate in themselves, but also to

some extent necessary and unavoidable in the conduct of business,—privileges which concern private affairs solely, and which are enjoyed by all other classes of citizens. It is an attempt on the part of the legislature to do what, in this country, cannot be done,—that is, to prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the right of the employer and the employee. More than this, it is an insulting attempt to put the laborer under legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States: *Godcharles v. Wigeman*, 113 Pa. St. 431.

In condemning this statute, we do not wish to give countenance to the idea that any employer, whether he is engaged in mining, manufacturing, or any other business, has the right to discriminate against his employees by selling to them goods or supplies, under similar circumstances, at a greater per cent of profit than he does to his other customers. Such a discrimination is not only unjust, but it is subversive of the first principles of trade; and no employee should buy from such employer. The remedy is in the hands of the employee. He is not compelled to buy from his employer; and the general law, without any special statute, will fully protect him in his refusal to do so. The ground on which this act is condemned is, that it is class legislation, and an unjust interference with the rights, privileges, and property of both the employer and the employee, and places upon both the badge of slavery, by denying to the one the right of managing his own private business, and assuming that the other has so little capacity and manhood as to be unable to protect himself or manage his own private affairs.

For these reasons, and upon the principles announced in the opinion of this court in *State v. Goodwill*, 33 W. Va. 179, *ante*, p. 863, hereinbefore referred to, we hold the said fourth section of the act aforesaid unconstitutional and void.

The judgment of the circuit court is reversed, the demurrer to the indictment sustained, and the defendant discharged.

FOR A MONOGRAPHIC NOTE discussing the questions involved in the principal case, see *ante*, pp. 870–890.

THRASHER v. BALLARD.

[33 WEST VIRGINIA, 285.]

JUDICIAL RECORDS OF OTHER STATES — AUTHENTICATION OF. — A state may authorize the reception in evidence of a judicial record of another state, though it is not authenticated, as required by the acts of Congress.

POWER OF APPOINTMENT BY WILL — HOW MUST BE EXECUTED. — If a deed vests a person with a power of appointment to be exercised by will, the form and mode of appointment must be observed, and a will made in attempted execution of the power must be so executed that it would pass the property, had it belonged to the testator absolutely.

CONFLICT OF LAWS. — **THE PROBATE OF A WILL GRANTED IN ANOTHER STATE,** and which, by the laws of the state, is local, and does not affect realty in other states, is not admissible in evidence in this state without re-probate here for the purpose of proving that the power of appointment, authorized to be exercised by will, has been so exercised.

PRACTICE — NONSUIT, RIGHT OF PLAINTIFF TO ENTER. — If a cause is tried before the court without a jury, and the plaintiff's case depends upon evidence which is objected to, but the objection is not passed upon until the court announces its final decision, and therein sustains the objection, the plaintiff has the right, of which the court cannot deprive him, to at once order a judgment of nonsuit to be entered, as he could have done had the court excluded the evidence when it was offered.

L. J. Williams and J. H. Holt, for the plaintiff in error.

F. Hereford, for the defendants in error.

BRANNON, J. Lucy J. Thrasher brought an action of ejectment in the circuit court of Monroe County against Lewis Ballard and others to recover a tract of land. The case was tried by the court in lieu of a jury, and judgment being rendered for the defendants, the plaintiff obtained this writ of error.

Both sides claimed under George B. Moffat. George B. Moffat, by deed dated October 3, 1856, conveyed the land to Daniel Stoner, trustee, to hold according to a trust defined in a deed from Daniel Stoner to William Nossinger, dated March 12, 1845, this land so conveyed by Moffat coming from the sale of and reinvestment of the proceeds of the land conveyed to Nossinger. The deed defining this trust provided that Matilda Stoner might give the property therein conveyed, or such portion as she might see proper, to her husband, or their children, by will.

On the trial, the plaintiff, to show title in her, introduced a paper purporting to be the will of Matilda Stoner, devising this land to the plaintiff, with the following certificate appended: "Virginia. In Wythe County court, September term, 1888. The will and testament of Matilda Stoner, de-

ceased, dated 2d February, 1884, was presented in court, proved by the oaths of R. C. Jackson and H. B. C. Buford, two of the subscribing witnesses thereto, and ordered to be recorded. Teste: Wm. B. Foster, Clerk. A copy. Teste: Wm. B. Foster, Clerk." The defense objected to its being read, and the court permitted it to be read, subject to the objection. The objection was, that it was not properly authenticated, and because it had not been recorded in Monroe County. It is suggested that it is without the court seal and a certificate of a judge, as required by section 19, chapter 130, Code 1887, which embodies the act of Congress touching the authentication of records of one state for use as evidence in others. But section 5 of same chapter, as to Virginia records, without regard to date, provides that a copy of any record or paper in the clerk's office of any court of that state, attested by the officer in whose office the same is, simply signed by him, shall be received as evidence. This provision must operate as an exception to section 19, requiring less authentication than do it and the act of Congress. This section does not exclude a copy authenticated as the act of Congress prescribes, but does admit copies certified without the seal and certificate of the judge. It seems to be generally agreed that the mode of authentication prescribed by act of Congress as to records of courts and public documents is not exclusive of any which the states may think proper to adopt: Opinion in *Ex parte Povall*, 3 Leigh, 816; 1 Greenl. Ev., secs. 489, 505. As to mere form of authentication, though not fully formal, it is one long used, and is good: *Wyn v. Harman*, 5 Gratt. 157.

But, looking not to mere form, was it admissible, and competent to vest legal title in the plaintiff? Was such its effect? Section 5 operates merely as to mode of authentication, prescribing a mode of authentication of evidence substituted for the original, and only says that such copy shall have the same effect as the original. Thus we are remitted to the original. Then, what effect has this will, and its Virginia probate in 1888? Now, the deed referred to vested Matilda Stoner with a power of appointment, to be exercised by will. When the deed disposing of the subject prescribes a form and mode of appointment, that form and mode must be observed: Opinion in *Ocheltree v. McClung*, 7 W. Va. 249. It must be accurately conformed to: Perry on Trusts, sec. 511 b; and in cases where the appointment is to be carried out by will, our statute (Code 1887, c. 77, sec. 4) is explicit:

"No appointment made by will, in the exercise of any power, shall be valid, unless the same be so executed that it would be valid for the disposition of the property to which the power applies, if it belonged to the testator." It therefore must appear that Matilda Stoner did make such a will as would pass her own absolute real estate. By this paper, the plaintiff sought to prove this. Then came the question, Is this her valid will? Of this there was no evidence but this Virginia probate. That could have no force beyond Virginia. It could not operate to pass land in this state by establishing the due execution and validity of the will: 1 Minor's Institutes, 942, 943; *Sneed v. Ewing*, 5 J. J. Marsh. 460; 22 Am. Dec. 41; *Rice v. Jones*, 4 Call, 89; 1 Lomax on Executors, c. 3, p. (341), 555; *Bowen v. Johnson*, 5 R. I. 112; 73 Am. Dec. 49; *Ives v. Allyn*, 12 Vt. 589; *Kerr v. Moon*, 9 Wheat. 565. An executor of one state has no power of suit in another, without re-probate and qualification in such other state: *Kerr v. Moon*, 9 Wheat. 565; 1 Rob. New Pr. 161, 162. There the foreign probate is ineffectual. Why not here? It may be argued that the act of Congress touching the authentication of records provides that such faith and credit shall be given to the public records and judicial proceedings of one state in every other state as they have in the state whence they come.

It has been held that probate orders do not fall, like judgments *inter partes* in ordinary suits, under this provision, but partake of the nature of *in rem* proceedings, binding only the property: *Bowen v. Johnson*, 5 R. I. 112; 73 Am. Dec. 49; while the reverse view has also been held: *Balfour v. Chew*, 5 Martin, N. S., 517. But grant that probate sentences do fall under the act of Congress. That gives the order such force as it has in Virginia; and the force it has there as to property is local, and does not affect realty in another state, which is governed by the *lex loci rei sitæ*. In the words of Story on Constitution, sec. 1313: "The constitution did not mean to confer a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the territory."

It may also be argued that it is not the will, as a will, that passes title, but it is the force of the deed, which, upon the due execution of the will, shifts the estate from the trustee to the appointee: Point 7, *Ocheltree v. McClung*, 7 W. Va. 232. This is true. Still, it must be shown that the event

upon which the appointment takes effect has occurred. If by deed, that it has been made; if by will, that it has been made, — made as the law requires it to be made; so made under our statute that it would be effectual to pass the trustee's own property. And this must be shown by production of the original will, with due proof of it, or original probate of it here, or re-probate by copy based on the Virginia probate, under the statute.

Our code, chapter 77, section 25, makes provision for the probate of wills made elsewhere relative to estate here by production in this state of a copy of the will and foreign probate, and provides that the same shall be admitted as a will of personal estate only, or real estate also, according to what is shown by the probate abroad. If the foreign probate were conclusive and effective without this statute, why this statute? Simply to give more convenient or additional evidence? Most of the states have similar acts. I think they were enacted because of the general principle that judicial proceedings in one state have no extraterritorial force as to estate beyond the state, which is governed by the law of the place of its situation. 1 Redfield on Wills, 401, states: "In those American states where the probate of wills is conclusive both of real and personal estate, the courts of equity will not assume jurisdiction to compel the performance of a trust arising under a will proved in another state, but of which there has been no probate, or its equivalent, by filing a copy of the original probate in the state where the trust is claimed to be enforced, and into which state the funds belonging to the estate have been removed by the personal representative. Probate and administration are entirely local." See *Curtis v. Smith*, 6 Blatchf. 537; 28 Myer's Fed. Dec., p. 577, sec. 99.

In *Kerr v. Moon*, 9 Wheat. 565, it was held that under the statute of Ohio, which permits wills made in other states, concerning property in that state, to be proved and recorded in the court of the county where the property lies, it must appear that the requisitions of the statute have been pursued, in order to give the will the same validity and effect as if made within the state. In opinion in *Lapham v. Olney*, 5 R. I. 413, it is declared: "Foreign probate is no evidence of its validity," — that is, of a will. *Bowen v. Johnson*, 5 R. I. 112, 73 Am. Dec. 49, declares second probate necessary under the statute referred to, and holds that when a foreign probate is presented for re-probate, it has a *prima facie* force for that

occasion. The opinion in *Curtis v. Smith*, 6 Blatchf. 537, expresses the opinion that no other evidence on that occasion can be received. Inferentially, the necessity of a probate by copy in this state is recognized in opinion by Haymond, J., in *Smith v. Henning*, 10 W. Va. 619.

A question has been argued as to whether the order admitting this will to probate generally, simply without disclosing upon what evidence it was admitted, would make it a valid will as to real estate. Judge Brockenbrough, in *Ex parte Provall*, 3 Leigh, 816, raised this question, but did not decide it. It is argued that *Smith v. Henning*, 10 W. Va. 619, decided that such a probate in Virginia makes it, so far as this point is concerned, a will of realty here. Without deciding it, I think the court regarded that will a will of realty, because it was probated in Greenbrier expressly as a will of personal and real estate, which re-probate, while in force, was conclusive on that question, as it has even been decided that the probate of a will having but one witness was, because of probate, valid as a will of realty: *Parker v. Brown*, 6 Gratt. 554. An admission to probate generally makes the will valid as a will of both personalty and realty: *Norvell v. Lessueur*, 33 Gratt. 222. As the law of Virginia at the date of this will, as to the manner of execution of wills to pass land, was the same as here, as we judically know, I incline to think that such a general admission to probate would justify its being regarded a will of land here; but we do not regard it necessary to decide as to this, and do not express a final opinion. The plaintiff, thus not having shown title, there was no error in rendering judgment against her, as a plaintiff must, in ejectment, show title.

The appellant assigns error in the refusal to allow him to take a nonsuit and a new trial. When was the motion for nonsuit and new trial made? The bill of exceptions states in its opening that it was taken to the finding and judgment of the court, and the action of the court in overruling her motion, and refusing, after the finding and judgment had been rendered, to allow her to take a nonsuit, and also refusing a new trial. It then proceeds to give successively, in detail, items of documentary evidence and facts agreed, and then passes on objections taken to the documentary evidence during the trial, and among the items, at its close, excluded the said will. In the next paragraph it says: "And the court thereupon found for the defendants." It then contains for-

mal exceptions to the court's action. It seems, therefore, that it was after judgment that the nonsuit was asked for, and also after the court had announced its rejection of the will. What time intervened between the exclusion of the will and the finding and judgment, we do not know. Usually, when the case is tried by a jury, the party knows exactly what evidence is in, and what the views of the court on the law of the case are; but where the case is tried by the court, sometimes there is no interval between rulings on the admission of documents, where they go in, as here, subject to objection, and the announcement of the finding and judgment, and little or no time is given for reflection, which is, under such circumstances, important. In many instances, this might operate as a surprise. Often, generally, the judge in one and the same opinion passes on the reserved objection to evidence, and in the next breath, as it were, announces his finding and judgment, giving no opportunity for a nonsuit, except by a disagreeable or apparently contemptuous interruption of the judge in delivering his opinion. At common law, a party could take a nonsuit at any time before the court received the verdict. Our statute limits this, where there is a jury trial, by requiring it to be done before the jury retires.

This cause was tried by the court. What is the rule in such cases? But three cases of this kind have come under my eye,—two in Indiana, one in Illinois. In Indiana, it was held too late to ask a nonsuit after the court announced its finding, but before the finding was entered on the order-book. The court treated this finding as a verdict, and said: "The plaintiff ought not to be permitted to take chance of getting a verdict, and after the verdict is given against him, escape from it by means of a nonsuit": *Doughty v. Elliott*, 8 Blackf. 405. The other Indiana case is *Long v. Thwing*, 9 Ind. 179, holding that after judgment it was too late. The record showed: "The court, after hearing the evidence in the cause, find for the defendant. It is therefore considered that the defendant recover of the plaintiff his costs expended. Whereupon the plaintiff moves the court for leave to suffer a nonsuit." The Illinois case is *Howe v. Harroun*, 17 Ill. 494, holding that "where a case is submitted to the court for trial, the plaintiff may take a nonsuit after the court has announced its opinion, and before a note thereof is entered." The opinion says: "By the common law the plaintiff could take a nonsuit at any time before the verdict of the jury was

announced to the court. And we have a statute which further restricts the right, requiring the plaintiff to take a nonsuit before the jury leaves the bar to deliberate upon their verdict. But in the case before us there is no law limiting the right to any particular time. . . . Both by common law and by our statute, when the case is tried by a jury, the plaintiff, before he determines whether he will take a nonsuit, not only has an opportunity of knowing precisely what the testimony is upon which his rights depend, and upon which the jury are to act, but he also hears the charge of the court to the jury. . . . And all know, who have carefully observed the course of *nisi prius* trials, that it is necessary to understand how the law is to be laid down to the jury . . . to enable a party judiciously to determine whether or not to take a nonsuit; while it may be conceded, with equal propriety, that the party should not know what is the opinion of the jury. Now, both these desirable ends cannot be attained when the court tries the question of fact in place of the jury. Either the plaintiff must have the benefit of the views of the court upon the law by which the case is to be governed, which can only be done after the court has expressed an opinion, or else he must be deprived of a right which has always been guaranteed to him by the common law. . . . It may be impracticable to secure to him the right of knowing the views of the court upon the law of the case without his also becoming informed of its views of the facts. . . . As it is, we must either abridge or extend the common-law right. We prefer to adopt the latter course, as we think it more conducive to justice."

The judge also said: "It is not a very easy matter to say what the rule should be." All practitioners know how important, in many instances, is this right of nonsuit. Where a party finds his documentary evidence defectively authenticated, or has failed to prove some fact, or any other difficulty in his way exists which might be repaired and removed on another trial, it is essential to him, and to the ends of justice.

The majority of the court are of opinion that as the court did not pass on the objection to the admission of the copy of the will when offered, but reserved such objection and allowed it to go in evidence subject to such objection, and it not appearing that there was any interval of time between the rejection of said copy and the announcement of the finding and judgment, affording opportunity for a non-

suit, the judgment must be reversed. My own opinion is, that error is never presumed, but must affirmatively appear; and that the bill of exceptions must show that there was no interval of time affording an opportunity to take such nonsuit before the finding, in order to reverse the judgment for refusal of a nonsuit; and that it is too late after such finding to ask a nonsuit; and that no ground for a new trial is shown in this case on that score. I would not reverse the judgment. By a majority of the court the judgment is reversed, the finding set aside, and the cause is remanded to the circuit court of Monroe for a new trial.

EVIDENCE — JUDICIAL RECORDS OF FOREIGN STATE AS. — The record of an insolvent proceeding in a Maryland court, under a statute of that state, with an office copy of a conveyance to trustee for the benefit of creditors recorded in the same court, is no evidence of a conveyance in Pennsylvania: *Donaldson v. Phillips*, 18 Pa. St. 170; 55 Am. Dec. 614. The certificate of the clerk as to the probate of a will, sufficient to have it admitted in evidence in the courts of Virginia, will be given the same faith and credit here, under the act of Congress: *Settle v. Alison*, 8 Ga. 201; 52 Am. Dec. 393, and note; *Lowry v. Hall*, 2 Watts & S. 129; 38 Am. Dec. 495, and note.

WILL — POWER OF APPOINTMENT. — Powers of appointment exercised in accordance with the power will be sustained; others will be rejected: *Cruse v. McKee*, 2 Head, 1; 73 Am. Dec. 186, and note; *Bentham v. Smith*, Cheves Eq. 33; 34 Am. Dec. 599; *Haslen v. Kean*, N. C. Term Rep. 279; 7 Am. Dec. 718.

EVIDENCE — PROBATE OF WILL OF FOREIGN STATE AS. — The probate of a will in another state is only *prima facie* evidence of its validity in Rhode Island: *Bowen v. Johnson*, 5 R. I. 112; 73 Am. Dec. 49, and extended note. See *Settle v. Alison*, 8 Ga. 201; 52 Am. Dec. 393, and note.

RICKETTS v. CHESAPEAKE AND OHIO R'Y Co.

[38 WEST VIRGINIA, 433.]

RAILWAY CORPORATION — LIABILITY OF, FOR ACTS OF LESSEE. — A railway corporation cannot, by lease or any other contract, in the absence of legislative authority, turn over to another corporation its road and the use of its franchise, and thereby exempt itself from responsibility for the conduct and management of the road. Therefore, a railway corporation cannot exonerate itself from liability to a passenger injured in an assault committed on him by a train-man, by proving that the portion of its road on which the assault occurred had been leased to and was being operated by another corporation.

JURY TRIAL — READING LAW REPORTS. — It is error for a court to permit an attorney to read, in the presence of the jurors, reports of other cases showing what verdicts had been given by jurors under similar circumstances.

CORPORATION — EXEMPLARY DAMAGES. — A railway corporation is not answerable in exemplary damages for an assault on a passenger by one of its agents made in a malicious, unlawful, wanton, and unnecessary manner, when there is no evidence that it was ever authorized, ratified, or approved by the corporation, or that the servant was incompetent or of known bad character.

Simms and Enslow, for the plaintiff in error.

Vinson and McDonald, and J. S. Marcum, for the defendant in error.

SNYDER, P. Action of trespass on the case, commenced on July 19, 1886, in the circuit court of Wayne County, by G. C. Ricketts, against the Chesapeake and Ohio Railway Company, for damages alleged to have been sustained by the plaintiff by reason of an assault committed upon him by an employee of the defendant. There was a demurrer to the declaration, which was overruled, and afterwards a trial by jury on the issue of not guilty resulting in a verdict and judgment in favor of the plaintiff for the sum of five thousand dollars. During the trial the defendant excepted to certain actions and rulings of the court, and to review said actions and rulings it has brought this writ of error.

All the evidence adduced on the trial is made a part of the record, and the first error complained of is, that upon the facts disclosed the defendant is not liable for the alleged injury to the plaintiff, because the wrong, if any, was done by the Elizabethtown, Lexington, and Big Sandy Railroad Company, and not by the defendant. The facts in respect to this question are as follows: The defendant is a domestic corporation, passing through this state, and connecting at the Big Sandy River, the state line, with the Elizabethtown, Lexington, and Big Sandy Railroad Company, a Kentucky corporation; and by a verbal arrangement between these two companies, the Elizabethtown, Lexington, and Big Sandy company operated that part of the defendant's road between the Big Sandy River and Huntington, a distance of about ten miles in this state. These two roads, while existing under separate charters and organizations, were in fact operated as a continuous line of railroad from Newport News, in the state of Virginia, to Lexington, in the state of Kentucky, passing through Richmond, Virginia, Huntington, in this state, and Catlettsburg, in Kentucky. The evidence does not disclose the terms under which that part of the defendant's railroad between Huntington and the state line was operated, or how the expenses were provided for, or

what division or disposition was made of the earnings. It does appear, however, that the defendant owns a large part of the rolling stock used on that part of its road; that at least some of the officers and servants in charge of that part of its line were paid by the defendant; and that the Elizabethtown, Lexington, and Big Sandy company had not complied with the provisions of the statutes of this state in such manner as to authorize it to operate a railroad in this state.

The facts further show that on December 21, 1885, the plaintiff, at Catlettsburg, in Kentucky, purchased of an agent of the Elizabethtown, Lexington, and Big Sandy company a ticket from that place to Huntington; that upon said ticket he took passage upon a train to Huntington, and after passing on the train into this state, he was found by the conductor in the ladies' car smoking a cigar, and then and there a difficulty arose, which resulted in the alleged assault upon and injury to the plaintiff, for which he brought this action.

It seems to me that under this state of facts the defendant was liable to the plaintiff, if he was injured by reason of the misconduct or negligence of the officers or employees on the said train. The court, in its opinion in *New York etc. R. R. Co. v. Winans*, 17 How. 38, 39, says: "Important franchises were conferred upon the corporation to enable it to provide the facilities for communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature." And in *Railroad Co. v. Brown*, 17 Wall. 450, the court says: "It is the accepted doctrine in this country that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter, or the general laws of the state, by a voluntary surrender of its road into the hands of lessees. The operation of the road by the lessees does not change the relations of the original company to the public": 1 Redfield on Railways, c. 22, p. 616, sec. 1.

In *Naglee v. Alexandria etc. R'y Co.*, 83 Va. 707, 5 Am. St. Rep. 308, the court decided that by executing a deed conveying its road, franchises, etc., to trustees selected by itself, a railroad company cannot evade its legal liabilities for injuries subsequently done to persons and property by the negligent operation of its road.

We think it may be stated as the just result of the decided cases, and on sound principle, that a railroad corporation cannot, without distinct legislative authority, by lease or any other contract, turn over to another company its road, and the use of its franchises, and thereby exempt itself from responsibility for the conduct and management of the road: *Pennsylvania R. R. Co. v. St. Louis etc. R. R. Co.*, 118 U. S. 309; *Grand Tower etc. Co. v. Ullman*, 89 Ill. 244; *Thomas v. Railroad Co.*, 101 U. S. 71.

In order to understand the next error complained of, which relates to the instructions to the jury, it is necessary to state that the evidence for the plaintiff tended to prove that the plaintiff was a passenger on the train, and finding no fire in the smoking-car, he went into the ladies' car, and was there smoking a cigar, but upon being informed by the conductor that it was a violation of the rules of the company to smoke in that car, he desisted; that soon after, a brakeman on the train struck him on the face, knocked him down, and injured him very seriously. The brakeman who assaulted the plaintiff was only acting as brakeman on the passenger train for that trip, his general employment and duties being that of brakeman on freight trains; and it is not shown that he was thereafter allowed to do service on any passenger train. It is proper to state, also, that the evidence of the defendant tended to show that the plaintiff persisted in smoking in the ladies' car after repeated requests to stop it, or go into the smoking-car; and that he was the aggressor, and his misconduct was the prime cause of the combat which resulted in the injury of which he complains.

While arguing the case to the jury, the plaintiff's counsel was allowed by the court, against the protest and objection of the defendant, to read from the American Reports verdicts in which large damages had been found by juries in cases similiar to the one on trial. At the instance of the defendant, the court afterwards instructed the jury "that in case they find for the plaintiff they are not to take into consideration, nor be influenced by, the verdicts of the juries in the cases read to them by the attorney for the plaintiff, in the argument of this case, in fixing the amount of damages the plaintiff is entitled to."

The plaintiff in error insists that it was error to permit the counsel for the plaintiff to read the said verdicts to the jury, and that the instruction of the court to disregard them did

not cure the error and wrong done thereby. In 1 Thompson on Trials, sec. 947, the law is stated as follows: "Counsel have no right, in argument, to introduce any evidentiary matters to the jury, which have not been regularly offered and admitted in evidence, in presenting the evidence in support of the action of the defense. . . . Applying these principles, it is held, even in those jurisdictions where counsel are permitted to argue the law to the jury, that they cannot be allowed, under pretense of reading legal authorities to the jury, to read passages from such books which bear upon questions of fact which are before the jury for consideration, thus introducing to the minds of the jurors evidentiary matters which have not been regularly admitted by the presiding judge": *Phoenix Ins. Co. v. Allen*, 11 Mich. 501; 83 Am. Dec. 756; *Baldwin's Appeal*, 44 Conn. 37.

In *City of Evansville v. Wilter*, 86 Ind. 414, which was an action against a city for damages resulting from injuries caused by a defective sidewalk, the court held: "Upon the trial, in such action, it is error to permit counsel for the plaintiff, over objection, in argument to the court in the presence of the jury, upon the question of the measure of damages, to read extracts from reported cases showing large damages held not excessive; but such error is cured by a direction of the court to the jury to the effect that the case before them must be determined upon the evidence, uninfluenced by the damages given in other cases."

It is difficult, if not impossible, to discover how, or in what way, the reading of verdicts in other cases could enlighten the court or the jury upon the principles of law involved in the discussion of the question of damages. It is almost impossible to resist the conclusion that the extracts which the counsel read were not read with a view to enable the court to rightly decide upon the law as to damages, but that the purpose was to reach and influence the jury in the amount of damages they should find in the case on trial. As the reading of such extracts could not enlighten the court as to its duties, and it being clearly improper matter to be read to the jury, it was necessarily error to permit it to be read by counsel; and the court should have sustained the objection of defendant's counsel. It is unnecessary, in this case, to decide whether or not the instruction of the court to disregard said extracts in making up their verdict cured the error, because the judgment here must be reversed for another error. It may

be proper to say, however, that, as a general rule, such error may be cured by such an instruction; but whether it will or not must depend upon the propriety of the verdict, and other facts in the particular case. The safer rule, therefore, seems to be to exclude such matters in the first instance, and not depend upon nullifying their prejudicial effects by an instruction.

From what has preceded, it sufficiently appears that the plaintiff in error was not prejudiced either by the refusal or the giving of any of the instructions, unless there was error in the giving of the following: "The court instructs the jury that if they find the defendant guilty, they are, in estimating the damage, at liberty to consider the health and condition of the plaintiff before the injury complained of, as compared with its present condition in consequence of said injuries, and whether said injury is in its nature permanent, and the reasonable expense incurred by the plaintiff, if any, in curing, or endeavoring to cure, the injuries he received; also, the damages suffered, if any, from the loss of time and inability to attend to business, resulting from the injuries received; also, the bodily and mental pain and suffering, if any, resulting from the injuries received, and for the outrage and indignity put upon him, and to allow such damages as in the opinion of the jury will be a fair and just compensation for the injury which the plaintiff has sustained;* and that if they believe that this assault was made in a malicious, unlawful, wanton, and unnecessary manner, then they will be warranted in giving the plaintiff exemplary damages."

It seems to me that there is no valid objection to all that part of said instruction which precedes the star (*), as above printed; but I am of opinion that the sentence following the star is erroneous. There was no evidence in this case proving, or even tending to prove, that the conduct of the brakeman in assaulting and injuring the plaintiff was either authorized or ratified by the company. In *Downey v. Chesapeake etc. R'y Co.*, 28 W. Va. 732, 743, this court, after referring to the fact that there was some diversity in the decisions, says: "But the better and more reasonable doctrine seems to be, that the railway company is not to be held liable in exemplary damages for injuries caused by the negligence of its servants, unless it be shown that the servant's act was willful, and was either authorized or ratified by the company; but such authorization or ratification can be evidenced either by

an express order to do the act, or an express approval of its commission, or by an antecedent retention of a servant of known incompetency, or by a subsequent retention or promotion of the negligent servant": Patterson on Railway Accident Law, p. 471, sec. 392.

As before stated, the evidence in this case shows that the brakeman who caused the injury complained of was only acting as brakeman on the train for that trip; and there is no evidence even tending to show that his conduct was either authorized or approved, or that he was incompetent, or of known bad character. In the absence of any such authorization or approval of the act of the brakeman, even if it was wanton and malicious, the company cannot be made responsible for exemplary damages. The extent to which it could be held liable would be for compensatory damages, such as are designated in the first part of the instruction. The character of the damages for which the defendant could be made liable having been specifically and fully covered by the first portion of the instruction, it was error to tell the jury, as the concluding sentence of the instruction in effect does, that they might, if they believed the assault was wanton and malicious, then, in addition to such damages as were characterized in the first part of the instruction, assess the defendant with exemplary or punitive damages: *Pegram v. Stortz*, 31 W. Va. 220. For this error, the judgment of the circuit court must be reversed, and a new trial directed.

RAILWAY COMPANY — LIABILITY FOR ACTS OF LESSEE. — The liability imposed by charter continues, no matter if it is leased or otherwise controlled and operated by another person or corporation: *Gulf etc. R'y Co. v. Newell*, 73 Tex. 334; 15 Am. St. Rep. 788; *Harmon v. Columbia etc. R. R. Co.*, 28 S. C. 401; 13 Am. St. Rep. 686, and note; *Rome etc. R. R. Co. v. Chasteen*, 88 Ala. 591. The lessor of a railroad is not liable for the negligence or torts of its lessee: *Miller v. New York etc. R. R. Co.*, 125 N. Y. 118.

RAILWAY COMPANY — LIABILITY FOR WANTON ASSAULT OF AGENT. — A corporation which is the lessee of a building used as a depot by different railroads will be liable to a passenger who, while lawfully upon the premises, is attacked and beaten by an employee: *Dean v. St. Paul etc. Depot Co.*, 41 Minn. 360; 16 Am. St. Rep. 703, and note. A railroad company must protect its passengers, and will be civilly liable for the willful assault upon one by a servant: *Dillingham v. Russell*, 73 Tex. 47; 15 Am. St. Rep. 753, and note. See extended note to *Ware v. B. & L. Canal Co.*, 35 Am. Dec. 192-201; *Spohn v. Missouri etc. R'y Co.*, 101 Mo. 417; *Royston v. Illinois Cent. R. R. Co.*, 67 Miss. 376.

DEITZ v. PROVIDENCE WASHINGTON INS. Co.

[33 WEST VIRGINIA, 526.]

EVIDENCE, THE ONLY PURPOSE OF WHICH MUST BE TO PREJUDICE A PARTY in the minds of the jury, should be excluded.

INSURANCE — EVIDENCE THAT THE PLAINTIFF WAS VERY POOR AND NEEDY should not be admitted to support an inference that his poverty might have led him to commit arson to obtain the amount for which his property was insured.

PRACTICE. — IF EVIDENCE APPARENTLY IRRELEVANT IS OFFERED, and an objection made to its reception, it is incumbent on the party offering it, if he expects to follow it up by further evidence which may render it relevant, to so state to the court, and to disclose the substance of such evidence. Failing to do this, he cannot successfully insist that the court erred in not receiving the evidence.

PRACTICE ON APPEAL. — JUDGMENT WILL NOT BE REVERSED AS NOT SUPPORTED BY THE EVIDENCE, unless after rejecting all the parol evidence of the appellant which conflicts with that of his adversary, and giving full force to the evidence of the latter, the decision of the court still seems to be wrong.

INSURANCE — MISTAKE IN WRITING NAME OF PARTY WHOSE PROPERTY IS INSURED. — If a policy of insurance is written in the name of the husband, through a mistake of an agent of the insurer, or of his clerk, who intended to write it in the name of the wife, whom he knew to be the owner of the property, an action may be sustained thereon by the husband for the use of the wife, though the policy contains a provision declaring that if the property is held in trust, or by leasehold or other interest not amounting to absolute or sole ownership, it must be so represented to the company and expressed in the policy in writing, and that the company will not be bound by any act or any statement made to or by any agent or other person which is not contained either in the policy or in the written application on which the insurance was based.

INSURANCE — CLERKS OF AGENTS. — MISTAKE OF A CLERK of an agent of the insurer in transcribing a policy is a mistake of the agent himself, and the obligations of the insured are the same as if the agent had made the mistake.

INSURANCE — WAIVER OF PROOFS OF LOSS. — If an insurance company, without making any objection to the absence of proofs of loss, writes to the assured that, "We don't intend to look any further into the matter, and we don't deny our liability, nor do we admit it," the proof of loss is waived.

INSURANCE — CLERK OF AGENT. — Insurance agents are not bound to attend to all the details of their business in person. They may authorize their clerks to contract for risks, deliver policies, collect premiums, take payments of premiums in cash or security, and to give credit or demand cash.

INSURANCE. — A BREACH OF CONDITION OCCURRING AFTER THE COMMENCEMENT OF AN ACTION on a policy of insurance, such, for instance, as false swearing, cannot operate to defeat the action.

ACTION in the name of John K. Deitz for use of his wife, on a policy of insurance issued in his name on her property.

The complaint was in the form prescribed by statute, but the defendant, on its demand, was accorded a more particular statement of the plaintiff's claim, and from such statement it appeared that the wife was the owner of the property insured; that the plaintiff procured the policy for her, acting as her agent; that the defendant's agent knew of the true ownership of the property at the time he made out the policy, but by mistake or oversight made it out in the name of the plaintiff; that the policy was kept by defendant's agent for some time and then given to plaintiff's wife; and that neither she nor plaintiff discovered the mistake until after the property insured was destroyed by fire. A demurrer was sustained and the action dismissed, but the judgment of the trial court was reversed. The policy contained the following stipulations and conditions respecting the ownership of the property.

"If the assured shall make any false representation as to the character, situation, or occupancy of the property, or the interest of the assured in the same, . . . or if the property be held in trust or on commission, or by leasehold or other interest not amounting to absolute or sole ownership, . . . it must be so represented to the company, and expressed in the policy in writing; otherwise the insurance as to such property shall be void. . . . If any persons other than the assured shall have procured this insurance to be taken by the company, such person shall be considered the agent of the assured, and not of this company; and this company shall not be bound by any act of, or statement made to or by, any agent or other person which is not contained either in the policy, or in the written application upon which the insurance, or any renewal, is based."

At the trial, the court gave, at the request of plaintiff, five instructions, to which the defendant excepted, to wit:—

"1. If the jury find from the evidence that at the time the policy in suit was executed N. B. Coleman was the agent of the defendant, and employed his son, R. A. Coleman, in his office to aid him in the discharge of his duties as such agent, and that the said R. A. Coleman, at the instance of said N. B. Coleman, examined the property insured before said insurance was taken, wrote out the policy in suit, and signed and countersigned the same for the said N. B. Coleman, by his business name of N. B. Coleman & Co., received the cash premium that was paid and the note given for the balance of

the premium, and transacted the whole business, so far as the defendant is concerned, in taking and completing said insurance; and if the jury further find from the evidence that said R. A. Coleman knew when transacting said business that the property insured belonged to Mrs. Sarah E. Deitz, the wife of the plaintiff; that he had been so told before writing up said policy by both Mr. and Mrs. Deitz, and that both Mr. and Mrs. Deitz relied upon him as acting for the defendant to issue a good and valid policy of insurance upon said property; that he knew at the time they so relied upon him, and he intended to issue the same in the name of Mrs. Sarah E. Deitz, but by mistake on his part issued the same in the name of Mr. Deitz, —then such mistake of the said R. A. Coleman does not vitiate said policy nor affect the plaintiff's right to recover in this action.

"2. If the jury find from the evidence that the defendant, after being notified of the burning of the premises insured, sent its adjuster to settle the loss, and said adjuster, after an examination of the facts and circumstances attending the burning, notified the plaintiff that the defendant was not liable and would not settle the loss, such notification was a waiver of the proof of loss mentioned by the policy on the part of the defendant, and the failure of the plaintiff to provide such proof is no defense to this action.

"3. If the jury find from the evidence that the plaintiff furnished the defendant with a proof of loss, although defective, and not such as is required by the policy sued on, and if they further find that the defendant never returned such proof to the plaintiff nor complained of it as being defective, then the defendant waived all defects in said proof and cannot set up the same in defense to this action.

"4. If the jury find from the evidence that the defendant, upon being notified of the destruction of the property insured, sent its adjuster to settle the loss some three weeks after the fire, and the said adjuster, after the examination of the facts and circumstances attending the burning, by his acts and declarations, gave the plaintiff to understand, and they were such as would give any reasonable and sensible person to understand, that the loss would not be settled without a suit, and that it would not avail him to furnish such proof of loss as is required by the policy, then such proof of loss was waived by defendant and the failure to furnish it is no defense to this action.

"5. If the jury find from the evidence that the defendant, at the time it issued the policy in suit, was fully and honestly advised of all the facts attending the ownership of the property insured, and that it was left with the defendant, through its agents, with such knowledge of all the facts, to issue a valid and legal policy upon said property, and the said policy, by mistake and error of such agent, or his clerk or employee, was issued in the name of John K. Deitz when it should have been issued in the name of Mrs. Sarah E. Deitz, then such mistake does not vitiate said policy nor affect the right of the plaintiff to recover in this suit."

The defendant requested the court to give the jury instructions numbers 1 to 15, as follows:—

"1. If the jury believe from the evidence that the policy in this case was issued without any mutual mistake between the parties, or that the defendant was not instructed by the plaintiff to write the policy in the name of his wife, S. E. Deitz, and the said defendant, by mistake, failed to do so, then they shall find for the defendants.

"2. That the jury must be satisfied from the evidence that the plaintiff, John K. Deitz, represented himself to be acting for and as the agent of his wife, Sarah E. Deitz, at the time the policy was issued or the insurance contracted for, and that he also notified the defendant that all the property mentioned in said policy belonged to her, the said Sarah E. Deitz, and that the plaintiff, as such agent, directed the defendant to make out the policy accordingly, and that the said defendant, by mistake or oversight, made out the said policy, after said instructions had been given, in the name of the plaintiff, and that neither the plaintiff nor Sarah E. Deitz discovered the alleged error until after the fire, before they can find for the plaintiff. [Rejected.]

"3. The jury are further instructed that any notice or knowledge of facts to a party that is the agent of the defendant, to bind or affect the defendant, must be such as the said party acquired in his capacity as agent; that mere rumors or matters coming to his knowledge in his individual capacity are not binding upon the principal. [Rejected.]

"4. If the jury believe from the evidence that any notice or knowledge of facts claimed by the plaintiff to have been brought home to the defendant through any agent of defendant was such notice or knowledge of said fact as was acquired by such agent while he was in some other business at another

time and not while he was acting for the defendant as its agent, then such notice or knowledge of facts will not be notice to the defendant, and the defendant will not be bound thereby.

"5. The jury are instructed that the terms, provisions, and conditions of the policy sued upon are binding and obligatory upon the assured and insurer, and the rights of the parties must stand upon the said contract, and that any violations of the terms and conditions thereof by the assured releases the defendant, unless waived by defendant.

"6. If the jury believe from the evidence that John K. Deitz or Sarah E. Deitz have made any fraudulent or false statements with the intention of defrauding the defendant, as to the cause of the fire, or as to the title or ownership of the property insured, or as to the amount or value of the property that was destroyed by the fire, the recovery for which this suit was brought, they should find for the defendant.

"7. If the jury believe from the evidence that the plaintiff has violated any of the provisions of section 3 of the policy, and has made any attempt to defraud the defendant by false swearing or otherwise, then and in every such case the policy shall be held void, and you shall find for the defendant.

"8. If the jury believe from the evidence that John K. Deitz or Sarah E. Deitz intentionally and fraudulently burned, or permitted the property insured, or any part thereof, to be burned, you shall find for the defendant.

"9. And the jury are instructed that upon the issue whether the plaintiff fraudulently and intentionally burned, or permitted the property insured to be burned, a preponderance of the evidence to that effect is sufficient, and need not be proven beyond a reasonable doubt that it was so fired.

"10. If the jury believe from the evidence that the plaintiff has failed to comply with the terms of the policy required by section 6 thereof in failing to furnish a proof of loss, etc., they shall find for the defendant, unless they are also satisfied that the defendant waived the said requirement.

"11. The jury are further instructed that a waiver, to be operative, must be founded on a valuable consideration, or must be such as to estop the party from insisting on the contract or forfeiture of the condition, and a waiver does not exist when the party is given to understand that he does not waive any rights incident to the matter against which the estoppel is set up.

"12. The jury are instructed, if they believe from the evidence that on or about the 15th or 20th, or between the latter date and the first day of September, 1886, that Robert Coleman was a clerk in his father's office, and that his father, N. B. Coleman, was the agent of the Queen Insurance Company, and sent his son, the said Robert A. Coleman, to examine the property, the loss for which is sued for in this action, with a view to its insurance, and that said R. A. Coleman then knew that the ownership of the property was in Mrs. Sarah E. Deitz, the wife of John K. Deitz, and that John K. Deitz, on or about the fifteenth day of October, 1886, came to the office of the said N. B. Coleman, the said agent of the Queen Insurance Company, and applied to him for insurance on said property, and that N. B. Coleman, the said agent, was not then informed by the said John K. Deitz that he was the agent of his wife, the said Sarah E. Deitz, and that his said wife was then the owner of said property, and that he desired a policy in her name, and that at that time N. B. Coleman did not know that the property at that time was owned by Sarah E. Deitz, and that the property was insured as the property of John K. Deitz; that the said Deitz himself then paid the cash payment, and gave his individual note for the residue of the premium, and that the said Queen Insurance Company required its agent, N. B. Coleman, to cancel said policy, which was done on the second day of December, 1886; and if they further believe from the evidence that on the same day a new policy was written in the Providence Washington Insurance Company, the defendant, by said agent, N. B. Coleman, by his clerk, R. A. Coleman, without any knowledge at that time that the property was owned by Sarah E. Deitz, and that no representations were made by said Deitz or his wife to said agent that Sarah E. Deitz was then the owner of said property, — then the jury must find for the defendant. [Rejected.]

"13. The jury is instructed that if they believe from the evidence that Samuel Gillespie was the agent of the defendant company, and was informed that the property was owned by Sarah E. Deitz, the wife of John K. Deitz, and that the policy was issued to John K. Deitz, and that when so informed he declared that Deitz had lost no property, and the company was not liable under the policy; and if the jury further believe that in a few minutes thereafter, in the same conversation, that the said Samuel Gillespie, as such agent,

read to said Deitz and his counsel, S. D. Littlepage, and then handed to the said John K. Deitz, the following writing:—

“‘CHARLESTON, W. VA., May 5, 1887.

“‘Upon examination of the premises and circumstances pertaining to your pretended loss under policy No. 1022445 in the Providence Washington Insurance Company, of Providence, Rhode Island, without either admitting or denying liability, we decline to further look into matter.

“‘SAM'L GILLESPIE,

“‘S. A. for P. W. Ins. Co.’

That such declaration so previously made during such conversation was not, under the circumstances thus appearing, sufficient to constitute a waiver of the proof of loss required by the terms of the said policy of insurance. [Rejected.]

“ 14. The jury is instructed that the defendant company is not responsible for the acts and declarations of persons not its agents; and if the jury believe from the evidence that Robert A. Coleman was not the agent of the defendant company at the time the policy of insurance issued by the defendant on the second day of December, 1886, and that N. B. Coleman was at that time agent of the company, and the said Robert A. Coleman was a clerk in the office; and if they further believe from the evidence that John K. Deitz made application to said N. B. Coleman for said policy of insurance, and did not disclose the fact that the property which he desired insured was the property of his wife, and the said agent, N. B. Coleman, had no knowledge that said property was owned by the wife of said John K. Deitz,—the plaintiff cannot recover in this action, although the jury may further believe that R. A. Coleman, clerk of the agent of the defendant, knew that said property so insured was owned by said Sarah E. Deitz. [Rejected.]

“ 15. If the jury believe from the evidence that on the fifth day of May, 1887, John K. Deitz made oath before C. J. Switzer, a notary public for Kanawha County, that he, the said John K. Deitz, was the owner of all the personal property destroyed by fire on the ninth day of April, 1887, and the loss for which is sued for in this action, and if the jury shall further believe that the said John K. Deitz afterwards, to wit, on the thirty-first day of December, 1887, and after the action was brought, made oath before E. B. Knight, a notary public in and for Kanawha County, that said personal prop-

erty so destroyed in said fire was then owned by Sarah E. Deitz, the wife of said plaintiff, and if the jury further believe that either of said affidavits were made with intent to defraud the defendant company, then they shall find for the defendant." (Rejected.)

Of these instructions the court gave all but numbers 2, 3, 12, 13, 14, 15, which were refused. Verdict and judgment for plaintiff. Defendant prosecuted a writ of error.

O. Johnson and W. S. Laidley, for the plaintiff in error.

S. D. Littlepage, and Knight and Couch, for the defendant in error.

LUCAS, J. The first error assigned by the defendants, as appears by the petition, is the refusal of the court to permit certain questions to be propounded to the plaintiff, John K. Deitz, as follows:—

1. "Had you license to sell liquors at the time the fire occurred?"

2. "Have you been frequently indicted for selling liquors at that saloon contrary to law?"

3. "Did you not tell George Pfeiffer that you were getting too old to work in the shop and make a living, and were it not for selling beer, etc., with or without license, that you could not get a living?"

The policy itself states, on its face, that the first floor of the two-story, frame, shingle-roof building insured was occupied "as a saloon." The question, obviously, therefore, was not intended to throw light on the character of the risk, or upon any other issue legitimately involved. The object, so far as it can be conjectured from the obvious effect of the questions, was to prejudice the minds of the jury against the witness, and the first two questions were properly ruled out by the court. The third question was liable to the same objection, and to the further objection of introducing into the case the circumstances or indigence of the plaintiff,—an inquiry too remote from any issue involved to be the occasion of any relevant or proper inference by the jury, as was decided in reference to a similar question in *Campbell v. Lynn & Co.*, 7 W. Va. 665. In that case, the defendant offered to give evidence to the jury "that the plaintiff was, during said three years, and ever since has been, in very poor and very needy circumstances, pecuniarily," and this court held that it was properly ruled out.

What has been said disposes, likewise, of the six questions propounded to George Pfeiffer, and the exception based upon the ruling of the court in excluding them. They related entirely to the plaintiff's selling whisky, and being in poor circumstances. I may remark that the defendant did succeed in getting in the evidence, through the witness Rutledge, that the plaintiff had been indicted for selling spirituous liquors, and the only remaining matter of ultimate exclusion in the questions above referred to was as to the indigence of the plaintiff, and I cannot think it a legitimate inference that a man has been guilty of arson because he is poor.

The other interrogatories excluded were those propounded to Mary Belle Lane, who testified that she worked for Mrs. Deitz both before and since the fire; that the last time she was in the house before the fire was in the spring of 1886. She was then asked: "What was in the house at that time, in the way of beds, furniture, etc.?"

I cannot see any pertinency in this question, standing alone, unless it was intended to affect the valuation of the personalty in the dwelling-house insured. For this purpose, looking to the facts that this was not at or about the time of insurance, but nearly six months before, and that the clerk of the agent had himself, according to his testimony, inspected the personalty at the time and inserted its value in the policy, I think the question was properly overruled. If it was intended to connect it, and follow it up by further evidence which would render it proper, the defendant, on the responsibility of counsel, should have so stated to the court, and what the further evidence was expected in substance to be.

The same may be said of the succeeding question, "What furniture was in the new house built after the fire?" This question, standing isolated, as it does, had no possible bearing on the case; had counsel stated that they expected to follow it up by further evidence on the part of this witness, or some other, that the furniture in the new house was identical with that which the plaintiff had sworn was burned, that might have made it relevant, but in the absence of any such intimation, the court did not err in excluding it.

These were all the questions excluded; and I think there was no error.

The second assignment is as follows: The court erred in refusing to set aside the verdict and grant a new trial, because of the rejection of proper evidence and the giving of improper

instructions for plaintiff and refusing proper instructions for defendant.

This assignment is supplemented by the brief of counsel, in which it is further claimed that the evidence was insufficient to warrant the finding of the jury. The bill of exceptions certifies, not the facts proved, but the evidence.

In such cases, the rule of this court, very often announced, is, that the judgment will not be reversed, unless by rejecting all the parol evidence of the exceptor which conflicts with that of his adversary, and giving full force and credit to that of the adverse party, the decision of the court below still appears to be wrong: *Henry v. Davis*, 7 W. Va. 715, and many cases since.

In my view of this case, and with the above principle applied to the evidence, the controversy resolves itself into a very narrow compass. It is, not whether the plaintiff proved all the facts as set out in the statement accompanying his declaration, but whether he proved those averments of his declaration which, if proved, would entitle him to recover, after having given notice of the same in his statement. The object of this statement prescribed by the act of 1882 (c. 77), as contained in the Code of 1887, p. 791, is "to notify the adverse party, in effect, of the nature of the claim or defense intended to be set up against him"; and if it suffices for that purpose, it cannot be adjudged insufficient: See Code 1887, p. 792, sec. 66.

In this case, the statement of the plaintiff notifies the defendant that the agent of the defendant who drew the policy made out the same in the name of John K. Deitz, instead of in the name of Sarah E. Deitz, his wife, "by mistake."

The question then is, whether this mistake was sufficiently proved to sustain the verdict.

The plaintiff's chief evidence upon this subject was given by Robert A. Coleman, an employee of the agent, N. B. Coleman, as clerk, and is as follows: "Mr. Deitz had been talking to me and father about insuring his property. He came up and wanted to be insured. He paid money in part, and give his individual note for balance. The policy was written in the Queen Insurance Company. The Queen refused to carry it, and it was then written in the Providence Washington Insurance Company. Both policies were written without consultation with Deitz or his wife. At that time I knew the property belonged to Mrs. Deitz. I knew it because I was

deputy sheriff. It was my mistake. I wrote the policy. Deitz gave his note, and the note was before me when I wrote the policy, and that was the way I happened to get his name in the policy. I did not know it was written in Mr. Deitz's name until after the fire. After Mr. Gillespie, the adjuster, came here, I was sick, and my father came to my room and asked me if I knew the property belonged to Mrs. Deitz, and I told him I did, and he asked me why I insured it in the name of J. K. Dietz, and I asked him if I had, and he said, 'Yes,' and I told him I had made a mistake, then. Both Deitz and his wife told me that she owned the property before the policy was written."

There is no further evidence of the plaintiff tending to weaken this testimony, and, we have seen, any conflicting testimony of the defendant must be rejected. Here, then, is a case of mere clerical misprision on the part of a clerk who, while intending to write one name, writes a different one by mistake, — by substitution of what happened to be before his eyes, for that which was in his mind, — the committing to the paper, not of the writer's design, but of something different, as the result of an absent mind or a lapsing pen.

This view of the testimony, which is obviously the correct one, and the one which the jury took, makes the question turn, not so much on the knowledge of the clerk, as on his acts, — what did he intend to write, as compared with what was actually written? On this subject, the clerk says: "It was my mistake; I wrote the policy; Deitz gave his note, and the note was before me when I wrote the policy, and that was the way I happened to get his name in the policy" (instead of the name of Mrs. Deitz). No court of equity would hesitate to correct an error of the scrivener thus clearly established, whether in a deed or parol contract. No court of record would hesitate to correct a clerical misprision in its own records, if the mistake were thus clearly established: *Blessing's Adm'r v. Beatty*, 1 Rob. (Va.) 287; in *Alexander v. Newton*, 2 Gratt. 266, "a mere mistake of the draughtsman" in drawing a deed was corrected; in *Peyton v. Harman*, 22 Gratt. 643, the words "to be paid," having been accidentally omitted by the penman, were supplied in a court of law.

So in our own court, it is said, in *Troll v. Carter*, 15 W. Va. 567: "A court of equity will correct the mistakes of a scrivener in drawing a deed." See also *Henley v. Menefee*, 10 W. Va. 771.

In this very case, when before this court at a former term, it was held that "parol evidence is competent to prove that the application was filled up by the agent of the company, and that the facts were fully and correctly stated to him, but that he, without the knowledge of the insured, misstated them in the application": *Deitz v. Insurance Co.*, 31 W. Va. 853; 13 Am. St. Rep. 909. The word "application" should be "policy," as will appear by looking at the statement of the case: 31 W. Va. 852, 853. If the defendant company had repudiated the contract altogether, on the ground that their agent, N. B. Coleman, had nothing to do with making it, and had not signed the policy, the case would be different; but when the company admits the contract, and rests its defense upon the mere clerical blunder of the "amanuensis" (to use the phrase of its counsel) of their agent, it stands upon a position utterly untenable, either in a court of law or equity.

I come, finally, to consider the instructions. And first, those given for the plaintiff, five in number. In their brief, counsel for the appellant direct their attention chiefly to the first instruction, and the fifth. The first will be found on page 909, *supra*. The objection urged against it is, that it assumes that there was evidence tending to prove certain facts, when in fact there was none, and such facts were not pretended to exist. For instance, it says that if they find that Robert, at the instance of his father, wrote out the policy in suit, signed and countersigned the same for his father in his business name, received the cash and the note for the balance, and transacted the whole business, so far as the defendant was concerned, in taking and completing the insurance, etc., then the plaintiff's right to recover is not affected.

The instruction is certainly in one or two of its hypotheses, liable to the objection urged, viz., that there was no direct evidence tending to show the particular facts supposed. Robert Coleman does not say he signed or countersigned the policy; he says: "I wrote the policy"; perhaps the jury might legitimately infer that this included signature and countersignature. So in regard to receiving the cash and the note. R. A. Coleman does not say he received the money or the note; he says: "At the time these policies were written, father was out of health, and I was doing most of the work, making daily reports, etc. Of the business I brought into the office, I received one half the commissions from my father." "I wrote the policy, — the policy in the Queen and in the Providence

Washington Insurance Company. I wrote the daily report for the case. The policy in the Queen was written about the 15th of October, 1886. Deitz came in and said he wanted his property insured, and he paid part cash and gave his sixty day note for the balance. He did not say anything about being agent for his wife. Father was present all the time Deitz was in the office."

There would be no great violence in the inference from this evidence that the son, and not the father, received the money; and that the son and clerk did in fact transact, according to his testimony, substantially, the whole business in taking and completing the insurance. But the material part of this instruction, and that to which the plaintiff in error most seriously objects, is the conclusion to the following effect: That if the jury find that Robert A. Coleman, the clerk, intended to issue the policy in the name of Mrs. Sarah E. Deitz, but by mistake on his part issued the same in the name of Mr. Dietz, then such mistake of the said Robert Coleman does not vitiate said policy, nor affect the plaintiff's right to recover in this action.

From what has been said above, it is apparent that this is a true statement of the law as applied to this case, and as decided when the case was here before, and therefore I find no error in this instruction. And these remarks apply with equal force to the fifth instruction, which will be found on page 911, *supra*. The defendant's counsel objects particularly to the use of the word "agents," in this instruction, as calculated to mislead, and as an assumption that N. B. Coleman was not the only agent of the company in this transaction. The force of this objection disappears when the fact is considered that the policy is signed "N. B. Coleman & Co., Agents," and the policy being before the jury, they could not be misled by language identical with that in the policy itself. Moreover, when it is established and admitted that R. A. Coleman was the clerk of the company's agent, then, his own agency, to that extent, and for the purpose of writing the policy, is conceded. Upon this subject, Mr. Woods says (see Woods on Insurance, sec. 409, p. 686): "Not only is the insurer responsible for acts of its agents, but also for the acts of its agent's clerks, or any persons to whom he delegates authority to discharge his function for him. Of course, the act must be done by some person authorized expressly or impliedly by the agent, and under such circumstances that the

insurer knew, or ought to have known, that other persons would be employed by and to act for the agent."

But it would seem almost superfluous to adduce authority to show that a mistake of the agent's clerk in transcribing a policy is a mistake of the agent himself, as much so as if done with his own hand.

The plaintiff's other instructions relate to the question of waiver of the proof of loss, by denial of liability and refusal to pay. In *Sheppard's Adm'r v. Peabody Ins. Co.*, 21 W. Va. 368, syl. 14, it was decided by this court that "a denial by an insurance company of its liability on other grounds, before any preliminary proofs are made, and before the time within which such proofs are to be made by the terms of the policy, is in law a waiver of the conditions of a policy requiring such proofs." The instruction to which this point in the *syllabus* applied, and in which the court found no error, used this language: "If the defendant declined to pay the said loss on other grounds than the failure of the plaintiff to furnish the said proofs."

It will thus be seen that this court does not seem to have been able, at that time, to draw the nice distinction, which the adjuster of the company undertook to establish, between a refusal to pay and a denial of liability.

No doubt the jury very properly considered the ingeniously worded notice which he gave, as follows: "We don't intend to look further into the matter, and we don't deny our liability, nor do we admit it,"—much more creditable to his ingenuity than to his frankness or candor.

I think this notice, of itself, would bring the case within the rule of waiver, laid down in *Sheppard v. Peabody Ins. Co.*, above quoted, and that there was no error in granting the instructions prayed for by the plaintiff.

I come now to consider those instructions of the defendant which were refused, being those marked respectively 2, 3, 12, 13, 14, and 15: *Ante*, pp. 911-914.

The second instruction prayed by the defendant sets out all the facts which the plaintiff embodied in his "statement," and instructs the jury that unless they find all these facts to be proved by the evidence, they cannot find for the plaintiff. Now, as I have said before, it was not necessary to prove all the circumstances detailed in the "statement" as facts, but only so much thereof as was necessary to support the declaration and authorize a verdict.

If the clerk knew to whom the property belonged, and it was left to him to write out the policy, and he, while intending to write the name of the true owner, wrote that of her husband, by a clerical mistake, then the plaintiff need prove nothing more in regard to ownership, to entitle him to recover. For this reason, I think the second instruction was properly rejected. Instruction No. 3, which was refused, must be read in connection with the fourth, which was granted. By comparing the two, it is manifest that the court rejected the third because of its attempt to draw a distinction between what a man knows "in his individual capacity," and what he knows in some other capacity, — a distinction which, if it exists, is of too refined and metaphysical a character to be readily apprehended by the average jurymen. I am satisfied (without conceding it to be a correct statement of the law) that instruction No. 4 embraced all that the defendant could ask upon the question of the agent's knowledge, and his mode of acquiring it, and that there was no error in refusing the third instruction asked by defendant.

The other instructions of defendant were given, as asked, consecutively down to the twelfth, and refused consecutively from the twelfth to the fifteenth, inclusive.

The twelfth sets out, in hypothesis, the defense of the defendant so far as relates to the ownership of the property, and the misdescription thereof in the policy. It requires the jury to find for the defendant, although they should believe that the agent sent his clerk to examine the property, and said clerk there learned the correct ownership, and was intent upon so writing it in the policy, when, by clerical misprision, he wrote another name in lieu of what he intended to write. To have given this instruction would have withdrawn from the jury the most material facts involved in the controversy, and it was properly refused. The thirteenth instruction relates to the waiver of the proof of loss, and could not have been given without ignoring and contravening the principle laid down in *Sheppard v. Peabody*, as above quoted, and relied upon.

Defendant's fourteenth instruction is erroneous, because it limits the power of the company's agent to such an extent as would be unfair to the public, and disastrous to the companies themselves. Insurance agents are not bound to attend to all the details of their business in person, and if they could not authorize their clerks or other assistants to carry on the

business, and renew policies, or contract in reference to them, they would frequently, in case of sickness or absence, have to close their offices altogether.

The case of *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117, 10 Am. Rep. 566, was a case exactly similar to this. The *syllabus* in that case is as follows: "An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums, and to take in payment thereof cash or securities, and to give credit for premiums, or to demand cash. And the act of the clerk, in all such cases, is the act of the agent, and binds the company as effectually as if done by the agent in person." See Story on Agency, sec. 14.

In the opinion of the court, we find the following passage which, in my opinion, is a correct statement of the law of this case: "But conceding this, it is claimed, on the part of the appellant, that his son, Charles Whelp, had no authority to waive the prepayment of the premium so as to bind the company. Charles had been the clerk and assistant of his father for three or four years. He had procured policies and renewal certificates from the company, and frequently delivered them to the persons insured, waiving prepayment of the premiums. All this he did with the knowledge and assent of his father, and hence we must infer that he was authorized by his father to do it. The agency of John Whelp was not such as to require his personal attention to all the details of the business intrusted to him. We know, according to the ordinary course of business, that insurance agents frequently have clerks to assist them; and that they could not transact their business if obliged to attend to all the details in person, and these clerks can bind their principals in any of the business which they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums, and to take payment of premiums in cash or securities, and to give credit for premiums, or to demand cash; and the act of the clerk in all such cases is the act of the agent, and binds the company just as effectually as if it were done by the agent in person. The maxim of *delegatus non potest delegare* does not apply in such a case: Story on Agency, sec. 14."

The fifteenth instruction instructs the jury to find for the defendant, in case they find that John K. Deitz, on the 5th of May, 1887, swore that he owned the personal property burned, and on the thirty-first day of December, 1887, after the

action was brought, swore that the same property belonged to his wife, and that either of said affidavits were made with intent to defraud the company.

Nothing is said in this instruction about the agency of John K. Deitz, though that, perhaps, would sufficiently appear from the record. However, the rights of the parties must be determined as they existed when the suit was commenced, and no affidavit of John K. Deitz made after that time could affect the rights of the owner of the property. After the company has denied its liability under the policy, they could not take advantage of the breach of any of the conditions thereof made after action commenced. No false swearing after the suit was instituted could change the rights of the parties as they stood when the writ issued. Therefore, I think there was no error in refusing this instruction.

Upon the whole, I can find no material error in the record of which the plaintiff in error can complain, and am therefore of opinion that the judgment of the circuit court should be affirmed, and that the defendant in error should recover his costs in this court, in this behalf expended.

INSURANCE — FRAUD OR MISTAKE OF AGENT — EFFECT OF, UPON INSURED. — The fraud of an agent or a mistake on his part when within the scope of his powers will not affect the rights of the insured: *Kister v. Lebanon etc. Ins. Co.*, 128 Pa. St. 553; 15 Am. St. Rep. 696, and note. *Deitz v. Insurance Co.*, 31 W. Va. 851, 13 Am. St. Rep. 909, and note, is a previous decision in the principal case; *Manhattan etc. Ins. Co. v. Weill*, 28 Gratt. 389; 26 Am. Rep. 364, and extended note; *Pickel v. Phoenix Ins. Co.*, 119 Ind. 292; *State Ins. Co. v. Gray*, 44 Kan. 731.

INSURANCE — ACT OF CLERK ACT OF AGENT. — The act of the clerk of an agent is the act of the agent, and, as such, binds the company: *Arff v. Star etc. Ins. Co.*, 125 N. Y. 57; 21 Am. St. Rep. 721, and note; *Fitzpatrick v. Hartford etc. Ins. Co.*, 56 Conn. 116; 7 Am. St. Rep. 288.

INSURANCE — WAIVER OF PROOFS OF LOSS. — Where an insurance company retains proofs of loss for a considerable length of time and returns them without any specific objection, it waives its right to any further or more complete proofs: *Davis Shoe Co. v. Kittanning Ins. Co.*, 138 Pa. St. 73; 21 Am. St. Rep. 904, and note. A notification by the company that it would not pay the loss thereby waives its right to proofs of loss: *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285; *German etc. Ins. Co. v. Gueck*, 130 Ill. 345; *Sun etc. Ins. Co. v. Mattingly*, 77 Tex. 162.

TOLEDO TIE AND LUMBER COMPANY v. THOMAS.

[33 WEST VIRGINIA, 566.]

CORPORATIONS. — **THE CONTRACT OF A FOREIGN CORPORATION WHICH HAS NOT COMPLIED WITH THE STATUTE** of this state, authorizing it to do business here, is nevertheless valid, and may be enforced by it, if the statute, after declaring what non-resident corporations should do before transacting business in the state, makes the doing of business without complying with the law a misdemeanor punishable by fine.

STATUTE, CONSTRUCTION OF. — **A STATUTE LIMITING THE RIGHT OF NON-RESIDENT CORPORATIONS** to do business, and imposing a fine for doing business before complying with the statute, such statute, being in derogation of the common law, and penal in character, should be strictly construed.

Simpson and Howard, Gunn and Gibbons, and Simpson and Thomas, for the appellant.

Tomlinson and Wiley, and Kenna and Chilton, for the appellees.

SNYDER, P. On November 21, 1888, the Toledo Tie and Lumber Company entered into a written contract with W. W. Thomas for the purchase of seventy-five thousand ties, at the price of thirty-two cents per tie for all first-class ties, and twelve cents per tie for all second-class ties, to be delivered at Point Pleasant, in this state, on board the cars, by June 1, 1889, or as soon thereafter as the rises in the streams will permit; and further, the said company agreed to advance to said Thomas eighteen cents per tie on all first-class, and five cents per tie on all second-class, ties, when such ties shall have been inspected and branded on the banks of Eighteen Mile Creek in Putnam County, West Virginia, and said company shall have the right to take possession of all ties so inspected and branded on which it has made such advances, wherever they may be found, in case the said Thomas fails to deliver the same. It is also agreed that the eighteen cents per tie advanced as aforesaid shall be considered full payment for said ties when so inspected; and the said Thomas binds himself to raft and deliver said ties on the cars at Point Pleasant, as aforesaid, and he shall then be paid the additional sum of fourteen cents per tie on first-class, and seven cents per tie on second-class, ties. Under this contract, Thomas commenced getting out and delivering ties, but before completing his part of the contract he became financially embarrassed, and by deed dated July 10, 1889, he assigned to J. C. Thomas and Rufus Switzer, trustees for the benefit of

his creditors, all his choses in action, and the benefit of all contracts which he has with any person whomsoever. A few days after said assignment, to wit, on July 15, 1889, the said Toledo Tie and Lumber Company presented to the judge of the circuit court of Mason County their bill against the said W. W. Thomas, and said J. C. Thomas and Rufus Switzer, trustees, and obtained from said judge an injunction restraining and inhibiting the said defendants from stopping or interfering with the said company in loading and shipping said ties. At the August rules, 1889, the plaintiff filed its bill, with the injunction thereon as aforesaid, in the said Mason County circuit court, and at the same rules, the defendants filed thereto two special pleas, a general demurrer, and their answers to the plaintiff's bill. The plaintiff demurred to each of said special pleas, and the cause was, on August 13, 1889, heard on the said pleadings, depositions, and the motion of the defendants to dissolve the injunction, and the court sustained the demurrers to said pleas, and overruled the motion to dissolve the injunction; and to this order the defendants J. C. Thomas and Rufus Switzer, trustees, have appealed to this court.

It is insisted that the court erred in not dismissing the bill for want of jurisdiction. The defendants' first special plea avers that the supposed cause of action alleged in the bill did not, nor did any part thereof, arise in the county of Mason; that the same arose within the county of Putnam, in this state, and that at the time of issuing the writ in this suit, the defendants resided and still reside in Putnam County. This plea is not sworn to, and is therefore not good as a plea in abatement. But the defendants, at the same rules at which the plaintiff filed its bill, filed their answers, in which they formally plead and rely upon the same matters alleged in the said first special plea, and the answer is sworn to in due form. I think, therefore, taking this plea and answer together, the defendants were entitled to an abatement of the suit, provided the facts alleged are sufficient for that purpose, and said facts should be proved.

Our statute (Code 1887, c. 123, secs. 1, 2) provides that suits of the class to which this suit belongs shall be brought either in the county wherein any of the defendants resides, or wherein the cause of action, or any part thereof, arose. The defendants, as we have seen, plead that none of them reside in Mason County, and that no part of the cause of action arose in said county; but, on the contrary, they all

reside in the county of Putnam, and every part of the cause of action arose in said county; therefore, if these allegations be true, the express mandate of the statute is, that this suit should have been brought in Putnam County, and, *per se-quence*, it was improperly brought in the county of Mason.

The appellants further insist that the court erred in sustaining the demurrer to the said second special plea. This plea, in effect, avers that the plaintiff is a foreign corporation, created and organized under the laws of the state of Ohio; that the contract alleged in the plaintiff's bill was made in Putnam County, in this state, and that from January 1, 1889, and continuously thereafter up to the time of the institution of this suit, the plaintiff, as such corporation, did transact divers of other business in the counties of Putnam, Mason, and Kanawha, of this state, and that it did not, at that time, or at any time before the institution of this suit, comply with any of the requirements of section 30 of chapter 54, Code of 1887, of this state; and therefore the defendants pray that the suit be abated. This plea raises the important question of the true interpretation of said statute. Among other provisions, the said statute declares, in substance, that any corporation created by the laws of any state or foreign country "may, unless it be otherwise expressly provided, hold property and transact business in this state, upon complying with the requirements of this section, and not otherwise." It then requires such corporation to file a copy of its charter with the secretary of state, and file in each county in which it does business a certificate of the secretary of state that it has so filed such copy of its charter in his office; and it further provides that "every such corporation which shall do business in this state without having complied with the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than five hundred dollars and not more than one thousand dollars for each month its failure so to comply shall continue."

In the absence of any statute limiting the right of a corporation to do so, it may, unless contrary to the public policy of the state, hold property and do business without as well as within the state or county by which it was created: Angell and Ames on Corporations, secs. 372-376; Field on Corporations, sec. 363. This statute, being not only in derogation of common law, but penal in its character, must be construed

strictly. There is certainly no public policy of this state which is contravened by permitting corporations such as the plaintiff here to do business in the state, because the statute expressly authorizes them to do so upon compliance with its requirements. The evident purpose of these requirements of the statute is to protect parties dealing with foreign corporations from imposition, and to secure convenient means of obtaining jurisdiction in the local courts of the state, and information such as will facilitate the service of process upon such corporations. It is clearly not the primary purpose of the legislature in passing such statutes to render the contracts and dealings of such corporations which have not complied with these requirements void and unenforceable. Hence the decided weight of authority is, that where the legislature has not expressly declared that this result shall follow from a failure to comply with the statute, the courts ought not to imply such a result, unless this be necessary in order to attain the primary object for which the statute was enacted. Upon this ground, it has been held that a contract made by a foreign corporation before it has complied with the statutory prerequisites to the right to do business will not, on that account, be held absolutely void, unless the statute expressly so declares; and if the statute imposes a penalty upon the corporation for failing to comply with such prerequisites, such penalty will be deemed exclusive of any others: *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Union etc. Ins. Co. v. McMillen*, 24 Ohio St. 67; *Ehrman v. Teutonia Ins. Co.*, 1 McCrary, 123; *Clay Fire etc. Ins. Co. v. Huron Salt etc. Co.*, 31 Mich. 346; *Hartford etc. Ins. Co. v. Matthews*, 102 Mass. 221; 2 Morawetz on Private Corporations, sec. 665.

We are aware that the courts of Indiana, Illinois, Wisconsin, and perhaps in some other states, hold a different doctrine. In Vermont and Oregon, it has been held that a non-compliance with the precedent conditions of the statutes of those states by foreign corporations rendered their contracts void. But it will be observed that these statutes imposed no penalty for the failure to comply with their provisions; and it is principally upon this ground that the contracts are held void, because otherwise the statute might be evaded with impunity. Thus in *Bank of B. C. v. Page*, 6 Or. 431, 436, the court says: "The general rule is, that a contract in violation of law is void. The only exception to the rule is, that when a law imposes a penalty for the prohibited

act, and it clearly appears that the legislature intended no more than to impose the penalty for the violation of the law, a contract made in violation of such a statute is not void." It is evidently the want of such penalty in the statute that influenced the court to hold the contract void. And such seems to be the ground of the decisions in Indiana and other states: *Wood Mowing etc. Co. v. Caldwell*, 54 Ind. 273; *Lester v. Howard Bank*, 33 Md. 558; 3 Am. Rep. 211.

The authorities on this question are reviewed in 2 Morawetz on Private Corporations, secs. 662-666, and that author announces as his conclusion therefrom, that "unless it appear affirmatively that the legislature intended to render the forbidden act or contract absolutely void in legal contemplation, it will not be so held"; citing *National Bank v. Matthews*, 98 U. S. 621, 627.

Let us apply these principles to our statute. The first provision is, that the foreign corporation may do business in this state "upon complying with the requirements of this section, and not otherwise." It next declares that such corporation so complying shall have the same rights and privileges, and be subject to the same liabilities, as domestic corporations. And it finally imposes a penalty upon such corporation for its failure to comply with the regulations of the statute. There is here no express declaration that the failure to comply shall render the contracts of the corporation absolutely void. Nor does it affirmatively appear that the legislature so intended. But it is expressly provided and declared that a failure to comply with the regulations prescribed shall be punished by fine. And his imposition of a penalty, as we have seen, in the absence of any express declaration to the contrary, must be held to be exclusive of all other penalties. That such was the purpose of the legislature in enacting this statute is manifest from the provision therein in respect to railroad corporations. It prescribes additional regulations for such companies, and declares that unless they are complied with such companies shall not maintain any action or suit in this state. The whole section shows no purpose to treat railroad corporations with more favor than other corporations, yet if we hold the contracts of all other corporations absolutely void, while only denying to railroad companies the right to sue in our courts, the effect would be to discriminate in favor of the latter. Upon the whole, I am

of opinion that the court did not err in sustaining the demurrer to said second special plea.

It is further contended by the appellants that there is no equity in the plaintiff's bill, and that the injunction should have been dissolved for want of jurisdiction in the equity court. The bill, after setting out the contract before referred to between the plaintiff and the defendant W. W. Thomas, avers that under said contract said Thomas had delivered to the plaintiff about ten thousand ties, for which it paid him in full; that Thomas on the recent rises in the streams had run down Eighteen Mile Creek about thirty-five thousand ties, the most of which are in the Kanawha River, and some of them have been put into rafts, preparatory to shipment and delivery to the plaintiff at Point Pleasant; that the plaintiff had inspected and branded said ties and paid Thomas in full for the same and taken possession of them before they had been run down Eighteen Mile Creek; that after the said ties had been run down said creek to the Kanawha River, and some of them were at Point Pleasant, in Mason County, and were being loaded on the cars, the defendants J. C. Thomas and Rufus Switzer, trustees, by their threats and interference with the agents and employees of the plaintiff and the railroad company, openly and wantonly prevented and stopped the plaintiff from loading, and the railroad company from receiving and shipping, any of said ties. It seems to me these facts, which are more formally and specifically set forth in the bill, are sufficient, if sustained by proof, to entitle the plaintiff to relief in a court of equity.

A large mass of depositions were filed by either side, but as no final decree or order settling the principles of the cause was made by the court, this appeal being simply from an order refusing to dissolve the injunction awarded the plaintiff, it is not incumbent upon this court to pass upon the proofs further than to decide, as we do, that the court did not err in overruling the defendants' motion to dissolve the said injunction. We are not called upon to decide, and we do not decide, in advance of final action by the court below, whether, on the proofs as they now are or as they may hereafter be made to appear in this cause, the circuit court should or should not on the final hearing dismiss the bill. All we now decide is, that, as a preliminary motion, the court did not err in refusing to dissolve the injunction, and that such motion

ought not to be finally acted upon until the hearing of the cause on its merits.

In reference to the objection to the jurisdiction of the circuit court of Mason County as set forth in the defendants' first special plea and answers to the bill, hereinbefore referred to, we think the proofs do not sustain the allegations therein made. The bill avers, and the proofs show, that a part of the ties in controversy in this cause were at Point Pleasant, in said county, at the time this suit was commenced, and that the rights and acts of the parties in respect to said ties is a part of the controversy in this suit, and that being so, the circuit court of said county had jurisdiction, provided the process was served, as it was in this cause, on some of the defendants in said county. For the foregoing reasons, I am of opinion that the order of the circuit court refusing to dissolve the injunction should be affirmed.

FOREIGN CORPORATIONS — POWER TO CONTRACT. — A foreign corporation may purchase machinery in one state to be transported and set up in another, though it has not complied with a statute requiring it to file certain papers with the secretary of state: *Colorado Iron Works v. Sierra etc. Mining Co.*, 15 Col. 499; 22 Am. St. Rep. 433, and note. A foreign corporation may sue on a contract though it has not complied with the statutory requirement as to the filing of its certificate: *Powder River etc. Co. v. Commissioners*, 9 Mont. 145; *Christian v. American etc. Co.*, 89 Ala. 198; notwithstanding the fact that the Alabama constitution prohibits a foreign corporation which has not complied with its provisions from doing a single act of business: *Farrior v. New England etc. Co.*, 88 Ala. 275.

STATUTES, CONSTRUCTION OF. — Penal statutes must be strictly construed: *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23, and note.

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ABORTION.

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2. **DECLARATIONS AND EXCLAMATIONS MADE IN LAST ILLNESS ADMISSIBLE IN EVIDENCE WHEN.** — Upon the trial of a prisoner indicted for criminal abortion, the declarations and exclamations indicative of pain and suffering, made by the woman in her last illness, and not referring to the past, are competent evidence. *Rhodes v. State*, 429.
3. **EVIDENCE THAT VICTIM OF ABORTION WAS BURIED BY COUNTY INADMISSIBLE.** — In a prosecution for criminal abortion, evidence showing that the woman upon whom the abortion was committed was buried at the expense of the county is not competent. *Rhodes v. State*, 429.

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1. **AGENCY CANNOT BE SHOWN** by the statements of the supposed agent. *Mullanphy Sav. Bank v. Schott*, 401.

2. **ONE DEALING WITH A SPECIAL AGENT** is bound, at his peril, to know the extent of the agent's authority. *Cleveland v. Pearl*, 748.
3. **NOTICE TO AGENT AS NOTICE TO PRINCIPAL.** — Notice to an agent of any fact or facts connected with the business with which he is employed is notice to the principal. *Mullanphy Sav. Bank v. Schott*, 401.
4. **SALE — PAYMENT BY CHECK OF AGENT.** — Where the purchaser, at the time of sale, directs the seller to deliver the goods to the purchaser's agent, to whom he has given the money to pay cash, the seller, by taking the personal check of such agent in part payment, upon the delivery of the goods, thereby discharges the debt of the purchaser in full, and accepts the check at his peril, especially when the purchaser has been prejudiced by a settlement made by him with such agent, without notice of the execution of the check, or of its dishonor. *Cleveland v. Pearl*, 748.

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ALTERATION OF INSTRUMENTS.

1. **BURDEN OF PROOF.** — If it appears that certain drafts have been materially altered, their holders must assume the burden of proving that they purchased in good faith and without notice of the alteration. *Smith v. Eals*, 486.
2. **EVIDENCE — BURDEN OF PROOF.** — If a writing appears to have been altered, but there is nothing to show when or by whom such alteration was made, the party claiming that it was made after delivery, and without authority, must assume the burden of proof. *Hagan v. Merchants' etc. Ins. Co.*, 493.

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APPEAL AND ERROR.

1. **AN EXCEPTION to the charge of the court, which does not assign any reason for the exception, nor point out the respect in which the charge is claimed to be incorrect or insufficient, will not be considered on appeal.** *Quintana v. State*, 730.
2. **A BILL OF EXCEPTIONS SHOULD be so full in its statements that the errors complained of appear from the allegations of the bill itself.** *Quintana v. State*, 730.
3. **WHAT NECESSARY TO APPEAL.** — Where the case is tried by the court, it is not necessary to an appeal to first move to set aside the findings, and when the motion is overruled, to take a bill of exceptions setting forth the facts. It is sufficient if the facts in evidence appear upon the record by the certificate of the court, or otherwise. *Laidley v. Smith*, 825.
4. **ORDERS GRANTING NEW TRIAL AND REVOKING SAME NO PART OF RECORD ON APPEAL WHEN.** — On an appeal from an order denying a new trial, a previous order of the trial court granting a new trial, and its subse-

quent order vacating and setting aside that order, and reinstating the motion for a new trial, which are not embodied in any bill of exceptions, but which are filed as an "additional record," upon the suggestion of a diminution of the record, do not properly form part of the record on appeal from the order denying the new trial, and will not be considered. *Ingerman v. Moore*, 138.

5. JUDGMENT WILL NOT BE REVERSED AS NOT SUPPORTED BY THE EVIDENCE, unless after rejecting all the parol evidence of the appellant which conflicts with that of his adversary, and giving full force to the evidence of the latter, the decision of the court still seems to be wrong. *Dietz v. Providence Ins. Co.*, 908.
6. READING LAW REPORTS. — It is error for a court to permit an attorney to read, in the presence of the jurors, reports of other cases showing what verdicts had been given by jurors under similar circumstances. *Ricketts v. Chesapeake etc. Ry Co.*, 901.
7. ERROR WITHOUT INJURY. — An irregularity consisting in entering one decree as applying to several creditors' bills, when a separate decree should have been entered on each bill, is error without injury, when such bills were against the same parties, involved the same issues, and were by consent heard together on the same evidence without consolidation, and affords no ground for reversal. *Beidler v. Crane*, 349.
8. IF EVIDENCE APPARENTLY IRRELEVANT IS OFFERED, and an objection made to its reception, it is incumbent on the party offering it, if he expects to follow it up by further evidence which may render it relevant, to so state to the court, and to disclose the substance of such evidence. Failing to do this, he cannot successfully insist that the court erred in not receiving the evidence. *Dietz v. Providence etc. Ins. Co.*, 908.
9. PRESUMPTION AS TO OBJECTIONS TO EVIDENCE. — Where a case is tried by the court without a jury, and testimony received, subject to a decision as to its competency on final hearing, and upon a motion to strike out, and no further challenge to the evidence is interposed, nor exception thereto reserved, an assignment of error based upon its admission will not be sustained on appeal. On the contrary, it will be presumed that the court, of its own motion, disregarded all improper evidence, and based its finding and judgment upon competent evidence only. *Travelers Ins. Co. v. Murray*, 267.
10. Instructions of the court on the defense of an *alibi* should be given when there is any evidence to support it, but the omission to give such instructions will not cause a reversal, unless special instructions upon the subject were asked and refused, or the omission of the court to charge upon it was excepted to at the time. *Quintana v. State*, 730.
11. CONFLICTING INSTRUCTIONS TO JURY, GIVING OF, GROUND FOR REVERSAL. — The giving to a jury of an instruction in irreconcilable conflict with another instruction previously given confuses the minds of the jury, and is a good ground for reversal. *Bates v. Railway Co.*, 665.
12. CHARGE UPON FACTS. — If a judge, in response to a request from the jury to define a certain word, gives a definition thereof, and adds: "And it is your duty, as jurors, to so find, whether the consequences may be as you would wish them to be, or otherwise," — this addition does not convert the definition into a charge upon the facts, nor is it improper. *Cobb v. Covenant Mut. Ben. Ass'n*, 619.
13. INSTRUCTION WHICH IS NOT PREJUDICIAL NOT GROUND FOR REVERSAL. — An instruction to the jury which could not have injured the party

complaining thereof, under the evidence in the case, is not ground for reversal. *Ingerman v. Moore*, 138.

14. REFUSAL TO CHARGE ON POINT NOT INVOLVED IN EVIDENCE NOT ERROR. — It is not error for the court to refuse to charge the jury upon a point not involved in the evidence. *Boyd v. Insurance Co.*, 676.

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ARREST.

LIABILITY OF OFFICER FOR SEIZING MONEY ON PERSON OF PRISONER. —

An officer, by virtue of his authority to arrest, may also search the prisoner, and seize and remove from his person any money, or anything connected with the offense, or which, in good faith, he has probable cause to believe to be connected therewith, or which may be used as evidence on the trial, without being liable in damages for trespass, although it may result that the money or thing was not in fact connected with the offense, or could not be used as evidence at the trial. *Ex parte Hurn*, 23.

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ASSAULT WITH INTENT TO RAVISH — EVIDENCE OF CHARACTER IN MITIGATION OF DAMAGES. — In trespass to recover damages for an assault with intent to ravish, evidence that the plaintiff was immodest and obscene in conduct and language is admissible in mitigation of actual damages. *Parker v. Coture*, 750.

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ASSIGNMENT.

1. **PARTIAL ASSIGNMENTS OF DEBT — RIGHT TO REFUSE TO RECOGNIZE, IS PERSONAL.** — The right to refuse to recognize partial assignments of a debt by a creditor is personal to the debtor, and cannot be claimed by a third party who sues the creditor and joins the debtor by trustee process. *Burditt v. Porter*, 763.
2. **ASSIGNMENT OF DEBT — NOTICE TO SELECTMAN NOTICE TO TOWN.** — Notice of an assignment of a debt against a town need not be given to a majority of its selectmen. Notice to one of them is notice to all, and to the town for which they act. *Burditt v. Porter*, 763.
3. **ASSIGNMENT OF DEBT — ACCEPTANCE BY DEBTOR — TRUSTEE PROCESS.** — An assigned order upon a town for the payment of its debt need not be accepted by its selectmen to protect the fund from attachment under trustee process. *Burditt v. Porter*, 763.

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ATTACHMENT — GARNISHMENT.

1. **EXEMPTION STATUTES ARE LIBERALLY CONSTRUED** in favor of debtors. *Collier v. Murphy*, 698.
2. **ATTACHMENT OF MONEY TAKEN FROM PRISONER.** — Money taken from the person of a prisoner at the time of his arrest, by an officer acting in good faith, under the belief, or reasonable and probable ground for the belief, that it is connected with the crime charged, or that it may be useful as evidence at the trial, is subject to attachment or garnishment while in the officer's hands or in court. If the arrest is not made in good faith, or if the money is not seized under probable ground for the belief mentioned, it is not subject to attachment or garnishment; or if the levy is procured by trickery or fraud on the part of the attaching creditor, it is invalid, and such creditor, as well as the officer making the levy with knowledge of the fraud, is liable in damages. *Ex parte Hurn*, 23.
3. **GARNISHEE CANNOT CONTEST VALIDITY OF JUDGMENT ON WHICH GARNISHMENT IS BASED.** — A garnishee cannot contest for mere irregularity the validity of the judgment upon which the garnishment is based. The judgment debtor alone can question the validity of such judgment, on the ground that the summons in the action in which it was rendered was served by a special officer who had been appointed to make the service without a proper affidavit having been first made. *Railway Co. v. Brooks*, 673.
4. **VOID CONDITIONAL JUDGMENT AGAINST GARNISHEE NOT CURED BY SERVICE OF SCIRE FACIAS.** — A conditional judgment rendered against a garnishee, without appearance by, or service of written notice upon, him, is void, and the subsequent issuance and service of a *scire facias* will not cure that defect, but the final judgment will also be void, although the garnishee failed to defend the *scire facias*. *Railway Co. v. Brooks*, 673.

See ASSIGNMENT, 3.

ATTORNEYS.

See APPEAL AND ERROR.

AUCTION.

SALE OF LAND AT AUCTION INDUCED BY MISREPRESENTATION OF QUANTITY. — If, at an auction sale of a lot of land, one of the auctioneers states that he has assisted in measuring it, and that it is of certain dimensions, which he specifies, one who purchases, relying on such statements, is not bound by his bid, and may recover any payment made by him, though the sale was made on the premises, and they were inclosed by visible fences, and the purchaser knew that the property sold did not extend beyond them. *Roberts v. French*, 611.

BAIL.

1. **BAIL FOR THE APPEARANCE OF AN ACCUSED** cannot avoid their liability for his non-appearance by showing that it was caused by his being in custody in another state, under a conviction there had against him for the commission of a felony. *Yarbrough v. Commonwealth*, 524.
2. **COURT, DISCRETION OF.** — If a statute provides that "if, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may, at its discretion, remit the whole or part of the

sum specified in the bail bond," the discretion of the court in exacting two thirds of the amount of the bail will not be controlled by the appellate court, in the absence of evidence that it was flagrantly abused. *Yarbrough v. Commonwealth*, 524.

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BANKS AND BANKING.

1. **ESTOPPEL BY LACHES — OVERCHARGE IN BANK ACCOUNT.** — A bank depositor who keeps an open bank account and deposit-book is not estopped to recover an overcharge in his account by the bank from long lapse of time in discovering the mistake, when no disadvantage has resulted to the bank from such delay. *Goodell v. Brandon Nat. Bank*, 766.
2. **OVERCHARGE IN BANK ACCOUNT — WAIVER OF DEMAND — STATUTE OF LIMITATIONS.** — An overcharge by a bank against the account of a depositor who keeps an open account and deposit-book is payable on demand; but such demand will not be waived, nor will the statute of limitations begin to run in favor of the bank, until the discovery of the overcharge by the depositor. *Goodell v. Brandon Nat. Bank*, 766.
3. **ESTOPPEL.** — A SAVINGS BANK IS NOT ESTOPPED FROM PROVING THAT A PASS-BOOK ISSUED BY IT WAS PROCURED by depositing with it as genuine a forged check on another bank, and obtaining credit for the amount of such check, though the holder of the pass-book has assigned it, or given an order on the bank for the amount thereof, to an innocent person, who paid value therefor in good faith. *McCaskill v. Connecticut Sav. Bank*, 323.
4. **IF A SAVINGS BANK ISSUES A PASS-BOOK WITHOUT RECEIVING ANY CONSIDERATION THEREFOR**, as where a forged check is deposited with it, and the amount thereof credited on such book to the depositor of the check, neither the latter nor his assignee in good faith can recover of the bank the amount of such credit. *McCaskill v. Connecticut Sav. Bank*, 323.
5. **SAVINGS BANKS — ASSENT BY DEPOSITOR TO BY-LAWS.** — A depositor, by receiving and holding a deposit-book as his voucher against the bank, and continuing his relation of depositor without signing such book, as required by the by-laws printed therein, of which he has actual knowledge, will be deemed to have assented to them as a part of his contract of deposit. *Gifford v. Rutland Sav. Bank*, 744.
6. **SAVINGS BANKS — BY-LAW — REASONABLE REGULATION.** — A bank by-law providing that the bank will not be liable for loss sustained when a depositor has not given notice that his deposit-book has been lost or stolen, and the deposit is paid in part or in full on presentation of such book, is a reasonable and proper regulation for the protection of the bank, and will protect it except where it fails to exercise reasonable care under facts sufficient to excite the suspicion of a prudent man and put him on inquiry. *Gifford v. Rutland Sav. Bank*, 744.
7. **SAVINGS BANKS — BY-LAW — NEGLIGENCE IN PAYING DEPOSIT TO THIEF.** — Under a bank by-law assented to by the depositor, providing that "the institution will not be responsible for loss sustained, when a depositor has not given notice of his book being lost or stolen, if such book be paid in whole or in part on presentment," the bank is not liable for paying the amount of a deposit to one who has stolen the depositor's

bank-book, presented it to the bank, and accounted for the manner in which the money was deposited, in a case where the money was deposited by letter, and the depositor has never been at the bank, is not known to its officers, who have never seen his signature, and have no notice of the loss of the book. *Gifford v. Rutland Sav. Bank*, 744.

BENEVOLENT SOCIETIES.

See **INSURANCE**, 27, 35-54.

BILLS OF EXCEPTION.

See **APPEAL AND ERROR**, 2.

BILLS AND NOTES.

1. **NEGOTIABLE INSTRUMENT, WHAT IS NOT.** — A SAVINGS BANK PASS-BOOK is not a negotiable instrument, nor does it become such when accompanied by a written order signed by the person to whom it was issued, directing the bank to pay the amount credited to him therein to another person. *McCaskill v. Connecticut Sav. Bank*, 323.
2. **ASSIGNMENT OF COMMERCIAL PAPER — DEFENSES.** — When the assignee of commercial paper, secured by mortgage, seeks relief in equity by foreclosure of the mortgage, the mortgagor may successfully interpose any defense which would have been available against the original payee or holder of the paper. This rule, however, has reference only to equities existing in the original obligor, and not to latent equities against the assignor residing in third persons. *Mullanphy Sav. Bank v. Schott*, 401.
See **ALTERATION OF INSTRUMENTS**, 1; **FALSE PRETENSES**.

BILLS OF REVIEW.

1. **CONDITIONS PRECEDENT TO RELIEF.** — A person seeking to reverse a former decree for error of law appearing on its face must have performed it before filing a bill of review; as, if it be for land, the possession must be given up; and if for money, it must be paid; or if there are circumstances bringing him within the exceptions to the general rule, he must show them to the court, and obtain an order relieving him from performance before filing the bill. *Kuttner v. Haines*, 370.
2. **BILL OF REVIEW IS NOT SUFFICIENT** which only sets out a synopsis of the former bill or answer, but the bill, answer, replication, and decree must be set out. These constitute the record for the inspection of the court. *Kuttner v. Haines*, 370.
3. **PERFORMANCE OF DECREE AS WAIVER.** — The delivery of the possession of a house on leased premises, in obedience to a decree, will not operate as a waiver of homestead rights, or as a release of errors of law, nor will it deprive the party of the right to contest the validity of the decree by suing out a bill of review. On the other hand, obedience to the decree is necessary before the bill can be sued out. *Kuttner v. Haines*, 370.

BONA FIDE PURCHASER.

See **BANKS AND BANKING**; **EXECUTORS AND ADMINISTRATORS**.

BONDS.

See **LOTTERIES**, 1, 2.

BRIDGES.

See MUNICIPAL CORPORATIONS, 11.

BROKERS.

REAL ESTATE AGENT, WHEN ENTITLED TO COMMISSIONS. — Where a real estate agent has introduced to his principal an acceptable purchaser, willing and financially able to buy on the terms named by the principal, he is entitled to his commission, even though, through the fault of the principal, the sale does not actually take place, and when the sale is actually made the agent is entitled to his commission, even though it may afterwards transpire that such purchaser was unable to meet deferred payments as they became due. *Wray v. Carpenter*, 265.

BROKERS.

See TROVER.

BURDEN OF PROOF.

See ALTERATION OF INSTRUMENTS; CARRIERS, 4; NEGLIGENCE, 13.

BY-LAWS.

See BANKS AND BANKING, 5-7.

CARRIERS.

1. **A COMMON CARRIER HAS NO RIGHT TO MAKE UNREASONABLE CHARGES** for his services, and cannot lawfully make unjust discrimination between his customers. *Cook v. Chicago etc. R'y Co.*, 512.
2. **RECOVERY OF PAYMENTS MADE FOR EXCESSIVE CHARGES.** — A shipper is entitled to recover from a common carrier a sum equivalent to the rebate which it allowed other shippers for whom it performed the same kind and extent of services, where it had collected full charges from such shipper without allowing him any rebate, and denied and concealed from him, when making such collection, the fact that it had allowed any rebate to his competitors in business. *Cook v. Chicago etc. R'y Co.*, 512.
3. **EVIDENCE OF UNJUST CHARGES.** — The fact that certain customers are charged less than others for the same services is evidence that the amount charged the former is unreasonable. Especially is this true when the lesser charges were maintained for long periods of time, and their existence concealed by lying and deceit. *Cook v. Chicago etc. R'y Co.*, 512.
4. **CONNECTING CARRIERS — LIABILITY OF LAST CARRIER — BURDEN OF PROOF AS TO LOSS.** — In an action against the last of a connecting line of carriers to recover for the loss of goods shipped on a through-bill of lading, the presumption prevails that the contents of the car delivered to the last carrier were the same, and the goods in the same condition, as when started by the first carrier. The burden of proof, in the first instance, is consequently on the plaintiff to show that the loss occurred while the car was *in transitu*, and without this proof he cannot recover. When this proof is produced, the burden is then on the carrier to show that the car and its contents were in the same condition when received by him as they were when started by the first carrier, or when delivered to him. *Cooper v. Georgia Pacific R'y Co.*, 59.

5. **CONFLICT OF LAWS. — A CONTRACT MADE IN ENGLAND** for the carriage of a passenger to the United States, though regarded by the laws of this state as against public policy and void, will be enforced here, if not illegal or immoral. Hence one accepting a passenger ticket contract in England, exempting the carrier from liability for loss resulting from its negligence, cannot recover in this state for a loss suffered through such negligence. *Fonseca v. Cunard S. S. Co.*, 660.
6. **PASSENGER CONTRACT TICKET. — One who accepts a passenger contract ticket**, consisting of two large pages, signed by the carrier, and with a blank space for the signature of the passenger, and which contains elaborate provisions regarding the rights of the passenger on the voyage, thereby assents to such provisions, and is bound by them, whether he reads them or not. *Fonseca v. Cunard S. S. Co.*, 660.

See **LIMITATIONS OF ACTIONS, 6; RAILROAD COMPANIES.**

CERTIORARI.

WHEN WILL LIE. — Certiorari will lie to bring up the true record as it in fact exists and as already made by the court below, no matter what the character of the defect in the transcript as certified on appeal in the first instance. *Certiorari*, however, will not lie to cause a record to be made or corrected. That must be done in the court below. *State v. Tingle*, 830.

CHATTEL MORTGAGES.

1. **CHATTEL MORTGAGE TO SECURE PURCHASE-MONEY, WHAT IS. — A chattel mortgage to secure the repayment of money given the mortgagor with which to purchase the articles mortgaged is a mortgage to secure the purchase-money, within the meaning of the section of the Civil Code of California authorizing the mortgaging of certain chattels "when mortgaged to secure the purchase-money of the articles mortgaged."** *Blaisdell v. McDowell*, 178.
2. **FRAUDULENT CONVEYANCES — ASSIGNMENT ABSOLUTE IN FORM INTENDED AS SECURITY. — Under an assignment of a patent right absolute in form, but intended only as security for present indebtedness to and future advances to be made by the assignor, he will take as a mere mortgagor, and not as an absolute owner, of the patent, as against the creditors of the insolvent assignor.** *Beidler v. Crane*, 349.

CHARACTER.

See **ASSAULT; CRIMINAL LAW, 3; SLANDER, 5.**

CHARTER.

See **RAILROAD COMPANIES, 28, 30.**

CHECKS.

See **AGENCY, 4.**

CLERKS.

See **INSURANCE, 15, 16.**

COMMISSIONS.

See **BROKERS.**

COMMUNITY PROPERTY.**See HUSBAND AND WIFE, 2.****CONFESSIONS.****See CRIMINAL LAW, 1; HOMICIDE, 7.****CONFLICT OF LAWS.****See CARRIERS, 5; WILLS, 4.****CONSIDERATION.****See CONTRACTS, 1, 2, 10; RAILROAD COMPANIES, 32.****CONSTITUTIONS.**

CONSTITUTIONAL PROVISIONS OPERATE PROSPECTIVELY only, unless a contrary intention clearly appears from the words employed. *Strickler v. City of Colorado Springs*, 245.

See STATUTES.**CONSTITUTIONAL LAW.**

See CONSTITUTIONS; ELECTIONS, 1; LEGISLATURE; LOTTERIES, 2, 4; STATUTES; WATERCOURSES, 4.

CONTEMPT.

WHAT REVIEWED ON APPEAL. — An appeal from a decree in equity will not bring up for review an order discharging a rule to show cause why punishment should not be inflicted for disobeying an injunction granted in the suit. Such order can be reviewed only by writ of error. *Alderson v. Commissioners*, 840.

CONTRACTS.

- 1. PROMISE IS NOT WITHOUT CONSIDERATION** when it is to pay \$1,750 for 3,500 shares of the capital stock of a mining corporation, though the only property of the corporation is a mining claim in Arizona, prosecuted to the extent of driving a tunnel for a short distance and sinking a shaft about twenty feet, and in which shaft a small vein of silver ore has been found, but not in quantities sufficient to justify milling the same; nor is the consideration of the promise so inadequate as to constitute a badge of fraud. *Coles v. Kennedy*, 503.
- 2. CONSIDERATION — SUFFICIENCY OF.** — A promise, if the promisee will not chew nor smoke tobacco during the life of the promisor, to pay him a certain sum at the death of the latter, is based upon a sufficient consideration, and may be enforced against his estate. *Talbott v. Stemmons*, 531.
- 3. CONTRACT PARTLY PERFORMED THE FUTURE PERFORMANCE OF WHICH BECOMES IMPOSSIBLE.** — If one contracts to furnish labor and material, and construct a chattel or build a house on the land of another, he will not ordinarily be excused from the performance of his contract by the destruction of the chattel or building, without his fault, before the time fixed for the delivery of it. On the other hand, when work is to be done under a contract on a chattel or building, which is not wholly the property of the contractor, or for which he is not solely accountable, as where repairs are to be made on the property of another, the agreement

- of both parties is upon an implied condition that the chattel or building shall continue in existence, and the destruction of it, without the fault of either of the parties, will excuse performance of the contract, and leave no right to recover damages in favor of either against the other for its non-performance. *Butterfield v. Byron*, 654.
4. **CONTRACT TO PERFORM A PORTION OF A WORK AND TO FURNISH A PORTION OF THE MATERIALS** required in the erection of a building is, upon the destruction of the building, after its partial completion, terminated, so that the contractor is under no obligation to perform the like work or furnish the like materials, should the person with whom he contracted conclude to re-erect the destroyed building. No damages can be recovered of the contractor for not completing the building, but he is entitled to recover for what he had done and furnished up to the time it was destroyed. *Butterfield v. Byron*, 654.
 5. **FAILURE TO READ.** — One who accepts a contract and avails himself of its provisions is bound by the stipulations and conditions expressed in it, whether he reads them or not. *Fonseca v. Cunard S. S. Co.*, 660.
 6. **WHO MAY SUE THEREON.** — A PARTY FOR WHOSE BENEFIT a contract is evidently made may sue thereon in his own name, though the engagement is not directly to or with him. *Paducah Lumber Co. v. Paducah Water etc. Co.*, 536.
 7. **PARTY RELEASING ANOTHER FROM OBLIGATIONS OF HIS CONTRACT MUST BEAR DAMAGE SUFFERED THROUGH HIS OWN ACT.** — If a vendor of land releases a purchaser from the obligations of his contract, or does not desire to enforce the same, the damage which he may thereby sustain through his own voluntary act cannot be visited upon another, who is alleged to have induced such purchaser to violate his contract, but must be borne by himself. *Burkett v. Griffith*, 151.
 8. **ACTION AGAINST PARTY FOR INDUCING ANOTHER TO VIOLATE HIS LAWFUL CONTRACT NOT MAINTAINABLE WHEN.** — If a plaintiff has sustained any damage in consequence of the refusal of persons to perform their lawful contracts with him, it is damage which may be compensated in actions brought by him against those persons, and the law supposes that in such actions the plaintiff will receive a full indemnity, and he has no right of action against a defendant whose words, however false and malicious, have induced the other contracting party to violate such agreement. *Burkett v. Griffith*, 151.
 9. **CONTRACT VOID AS AGAINST PUBLIC POLICY.** — A contract by which a party agrees to give to another the exclusive sale of grain-bags or burlaps, up to a certain specified number, to be under the former's control or a specified period, and agrees to accept for them the average price received by such other party for all grain-bags or burlaps sold by him, said first party agreeing to sell them for a specified commission, and binding himself to sell a specified number of them, is not on its face void as being in restraint of trade or against public policy. But if it be shown that such contract forms part of a scheme to establish a monopoly in grain-bags or burlaps, to the prejudice of the people of the state, the contract will be held void, as opposed to public policy. *Pacific Factor Co. v. Adler*, 102.
 10. **STATUTE OF FRAUDS — PROMISE TO PAY THE DEBT OF ANOTHER.** — A promise by the owner of a building in process of construction, that he will see a subcontractor paid for his work if the original contractor does not pay him, is a promise to pay the debt of another, and within the

statute of frauds, though the subcontractor is entitled to file a lien against the building, and the consideration of the promise is forbearance to file such lien. *Warner v. Willoughby*, 343.

11. **STATUTE OF FRAUDS — PROMISE OF EXECUTOR OR ADMINISTRATOR.** — That portion of the statute of frauds of Connecticut declaring that no civil action shall be maintained upon any agreement whereby to charge any executor or administrator upon a special promise to answer charges out of his own estate, unless such agreement, or some memorandum thereof, be in writing, and signed by the party to be charged therewith or his agent, refers to promises made by an executor or administrator to answer out of his own estate for some liability existing against the decedent in his lifetime. *Dillaby v. Wilcox*, 299.
 12. **STATUTE OF FRAUDS — PROMISE TO ANSWER FOR THE DEBT OF ANOTHER.** — If a person, not before liable, agrees to pay the debt of a third person, and as a part of the arrangement the original debtor is discharged from his indebtedness, the agreement is not within the statute of frauds. It is otherwise if the original debtor continues liable. *Dillaby v. Wilcox*, 299.
 13. **STATUTE OF FRAUDS. — A PROMISE BY AN ADMINISTRATOR TO PAY CERTAIN TAXES** if the tax collector would forbear to levy upon chattels on which the estate represented by the administrator had a mortgage, but upon which the taxes were not a lien, is a promise to answer for the debt of another, and therefore within the statute of frauds. *Dillaby v. Wilcox*, 299.
 14. **STATUTE OF FRAUDS. — IF THE PERSON UNDERTAKING TO PAY THE DEBT OF ANOTHER RECEIVES PROPERTY OR FUNDS** of the debtor for the purpose, his promise is, in no proper sense, an undertaking to answer for the debt of another, but an undertaking to apply the property or funds to such payment. *Dillaby v. Wilcox*, 299.
 15. **STATUTE OF FRAUDS SATISFIED BY CONTRACT THAT CAN BE EXTRACTED FROM CORRESPONDENCE.** — If a contract which comes within the statute of frauds can be extracted from correspondence between the parties upon the subject of the contract, the statute is satisfied. *Austin v. Davis*, 456.
- See CARRIERS, 5; CORPORATIONS; DAMAGES, 2-5; MUNICIPAL CORPORATIONS, 14; PARENT AND CHILD; PLEADING, 4.**

CONTRACTS OF SALE.

See VENDOR AND PURCHASER.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVERSION.

See CO-TENANCY, 2; TROVER.

CORPORATIONS.

1. **POWER OF PRESIDENT TO BIND CORPORATION.** — The president of the board of trustees of a corporation, in the absence of express or implied power, has no more authority to bind the corporation than any other individual trustee. *Lyndon Mill Co. v. Lyndon etc. Inst.*, 783.

2. **POWER OF PRESIDENT — PRESUMPTION.** — It will not be presumed, that by virtue of his office as president of the trustees of a corporation, such president has power to bind the corporation. *Lyndon Mill Co. v. Lyndon etc. Inst.*, 783.
3. **RATIFICATION OF UNAUTHORIZED CONTRACT.** — Officers of a corporation without authority to bind the corporation by their acts have no power to ratify an unauthorized contract by their failure to repudiate a claim arising out of such contract, when presented against the corporation. *Lyndon Mill Co. v. Lyndon etc. Inst.*, 783.
4. **NOTICE TO AGENT AS NOTICE TO CORPORATION.** — Where two corporations have dealings through the intervention of a mutual agent, the question of whether or not either corporation is to be charged with notice of what is known to such agent by virtue of his relation to the other depends upon the circumstances of the case. *Lyndon Mill Co. v. Lyndon etc. Inst.*, 783.
5. **IMPLIED PROMISE TO PAY FOR GOODS RECEIVED.** — Where the president of the board of trustees of a corporation without authority to bind it orders goods for its use, under an agreement with his co-trustees that he is to furnish such goods gratuitously, the fact that the corporation receives and uses them will not raise an implied promise to pay, or make it liable for their price; nor will the fact that such president is an officer in the corporation furnishing the goods, with knowledge that such goods are charged to the other corporation, make it liable for their price. The knowledge of such trustee, in such case, is not imputable to the corporation sought to be charged. *Lyndon Mill Co. v. Lyndon etc. Inst.*, 783.
6. **POWER OF OFFICER TO DEAL WITH.** — A director or officer of a solvent corporation is a trustee and agent of it and of its stockholders only and so far as its creditors are concerned. He may deal with it, loan it money, and take security therefor, in like manner as a stranger. In such case the subsequent insolvency of the corporation will not affect such officer's right to recover his loan or enforce his security. *Mullanphy Sav. Bank v. Schott*, 401.
7. **RIGHTS OF DIRECTOR AS PRIOR MORTGAGEE.** — A director, who is a prior mortgagee of the corporation, by voting for the issue of bonds to pay the corporate debts and to secure the same by mortgage on the same property, and who is willing to accept payment of his debt before its maturity, does not thereby waive his priority of lien, nor will the fact that he accepts such bonds to sell, and failing to negotiate a sale of them returns them to the corporation, constitute a satisfaction or release of his prior mortgage lien, in the absence of an agreement by him to accept such bonds in payment of his debt. *Mullanphy Sav. Bank v. Schott*, 401.
8. **MORTGAGE BY — EVIDENCE OF AUTHORITY.** — Where bonds, and a deed of trust to secure their payment, are issued, executed by the president and secretary of a corporation, under its seal, this is *prima facie* evidence that they were executed by authority of the corporation. *Mullanphy Sav. Bank v. Schott*, 401.
9. **ESTOPPEL AGAINST CORPORATION TO DENY ITS LIABILITY,** by reason of its failure to disaffirm an unauthorized contract made with it, does not arise until it has knowledge that such contract has been made, or the party claiming the estoppel has been damaged by its authorized act. *Lyndon Mill Co. v. Lyndon etc. Inst.*, 783.

10. **EVIDENCE OF UNAUTHORIZED CONTRACT.** — In an action against a corporation to recover for goods claimed by it to have been furnished under an unauthorized contract, evidence of an agreement between the president of the board of trustees of such corporation and his co-trustees, that he was to furnish the goods gratuitously, is admissible to show his want of authority to bind the corporation for their price. *Lyndon Mill Co. v. Lyndon etc. Inst.*, 783.
11. **NEGLIGENCE AND TORT, LIABILITY FOR.** — A private corporation is bound to respond in damages for its negligence or tort. *Elmore v. Drainage Commissioners*, 363.
12. **DECLARATIONS OF OFFICER AS EVIDENCE.** — Representations made by the president of a corporation while negotiating the sale of corporate bonds, that the mortgage securing them was the first lien on the corporate property, though made within the scope of his authority, are not admissible against a stockholder, not present when they were made, to affect his interest as mortgagee of the corporation under a prior mortgage, nor are such representations admissible against the assignee of such mortgagee. *Mullanphy Sav. Bank v. Schott*, 401.
13. **SECONDARY EVIDENCE OF RESOLUTIONS.** — Where resolutions of a private corporation sought to be introduced in evidence are shown to have been in particular hands, or if it is the natural presumption that they are in certain hands, the person into whose hands they have been traced must be produced, or it must be proved by legal evidence that they are not where they are presumed to be, before secondary evidence of their contents is admissible. *Mullanphy Sav. Bank v. Schott*, 401.
14. **RESOLUTIONS OF PRIVATE CORPORATIONS** are not entitled to be recorded in the office of the recorder of deeds. *Mullanphy Sav. Bank v. Schott*, 401.
15. **LIABILITY OF SUBSCRIBERS FOR STOCK PAID FOR IN PROPERTY.** — Under the constitution and statutes of Alabama, where corporate stock subscriptions are made payable in property, it must be taken at a reasonable money value, and although a margin will be allowed for honest differences of opinion as to such value, deliberate and intentional overvaluation is not permissible; and when such overvaluation is grossly excessive and intentionally made, though without actual fraud, it is invalid as to corporation creditors, who may proceed against the stockholders individually as for unpaid stock subscriptions. *Elyton Land Co. v. Birmingham Warehouse etc. Co.*, 65.
16. **UNPAID STOCK SUBSCRIPTIONS — LIABILITY TO CREDITORS.** — Any arrangement between stockholders and the corporation to issue stock as fully paid for, though only partly paid for in fact, either in money or property, and by which the corporation does not get the benefit of the full price of the stock in good faith, may be valid and binding between the corporation and the stockholders; but it is invalid as to the creditors of the former, and may be set aside at their instance, and full payment on the stock enforced for the satisfaction of the corporate debts. *Elyton Land Co. v. Birmingham Warehouse etc. Co.*, 65.
17. **LIABILITY OF SUBSCRIBERS — RIGHTS OF CREDITORS.** — Where parties organize a corporation with a capital stock of two hundred and fifty thousand dollars, and subscribe for the whole stock, giving in payment therefor, without actual fraud, a bond for title to land costing them five thousand dollars, the actual value of the land being fifty thousand dollars, for the payment of the remainder of the purchase price of which

the corporation gives its notes, the stockholders are liable to the creditors of the corporation to the extent of the difference between the actual value of the property and the amount of their subscriptions, under constitutional provision prohibiting the issue of stock except for money or property actually received, and a statutory requirement that all stock subscriptions shall be paid in money or labor, or property at its money value. *Elyton Land Co. v. Birmingham Warehouse etc. Co.*, 65.

18. CAPITAL STOCK — RIGHT OF CREDITORS. — The capital stock of a corporation constitutes the basis of its credit, and persons dealing with the corporation have a right to assume that the stock has been actually paid in, or that it may be reached for corporate debts. *Elyton Land Co. v. Birmingham Warehouse etc. Co.*, 65.
19. MISREPRESENTATION TO INDUCE PURCHASE OF STOCK. — Agreement to purchase stock in a mining corporation, induced by representing that one who was known as a successful business man of large experience and capacity had subscribed and paid for five thousand shares of such stock, when in fact he had a secret contract exonerating him from making any payment therefor, is obtained by fraud, and will be canceled by a court of equity. *Coles v. Kennedy*, 503.
20. CORPORATION LIABLE FOR ILLEGAL TRANSFER OF SHARES OF ITS STOCK WHEN. — Where an administratrix sells shares of stock belonging to her intestate without complying with the order of sale, the corporation whose shares of stock are thus sold will be liable to the estate of such intestate for any loss occasioned to it by reason of such corporation having transferred such shares on its books to the purchaser without ascertaining that the administratrix had complied with the requirements of the order of sale, the corporation having had notice that the stock belonged to the estate of the intestate, and that an order of sale had been made. Before such corporation could lawfully cancel the stock held by the intestate's estate, it was bound to know, not only that an order of sale had been entered by the court, but that a sale had also been made pursuant to the terms of that order. *Citizens' etc. Ry Co. v. Robbins*, 445.
21. THE CONTRACT OF A FOREIGN CORPORATION WHICH HAS NOT COMPLIED WITH THE STATUTE of this state, authorizing it to do business here, is nevertheless valid, and may be enforced by it, if the statute, after declaring what non-resident corporations should do before transacting business in the state, makes the doing of business without complying with the law a misdemeanor punishable by fine. *Toledo T. & L. Co. v. Thomas*, 925.

See BANKS AND BANKING; COVENANTS, 3, 4; DRAINS; MUNICIPAL CORPORATIONS; RECEIVERS.

COSTS.

See COURTS.

CO-TENANCY.

1. CO-TENANTS, PRESUMPTION AS TO INTERESTS OF. — If property is shown to belong to two or more persons as co-tenants, their respective interests will be presumed to be equal. *Burton v. Kennedy*, 769.
2. WRONGFUL SALE OF CHATTELS OF A CO-TENANT, AND HIS RIGHT TO AN ACCOUNTING THEREFOR. — If chattels belonging to a mother and children as tenants in common are sold by her second husband, who is also

guardian of the children, and the proceeds are by him converted to his own use, such sale is a conversion, but the children may waive the tort and maintain an action against the guardian for an accounting. *Latailade v. Orena*, 219.

See EXECUTIONS, 2, 9; PARTITION.

COUNTERCLAIM.

See INSURANCE, 19; SET-OFF.

COURTS.

RULE OF COURT requiring copies of all pleadings to be filed for the use of the adverse party, and allowing certain specified sums as costs therefor, is valid. *Cook v. Chicago etc. R'y Co.*, 512.

See LIMITATIONS OF ACTIONS, 7.

COVENANTS.

1. **COVENANT OF SEISIN IN DEED, WHEN BROKEN.** — A covenant of seisin in a deed of land is broken as soon as made, where the vendor, at the time of the conveyance, had no other title to the land than that acquired by him through the deed of an infant, made for a merely nominal consideration. *Robinson v. Coulter*, 708.
2. **COVENANT OF SEISIN, GRANTEE MAY TREAT AS WHOLLY BROKEN WHEN.** — Where a deed with covenant of seisin purports to convey the entire estate, and the title fails as to an undivided interest therein, the grantee may elect to treat this as an entire failure of title, and is entitled to recover the full value of the property. *Robinson v. Coulter*, 708.
3. **CORPORATION — MORTGAGE — EFFECT OF COVENANTS ARISING FROM WORDS "GRANT, BARGAIN, AND SELL."** — The covenants arising from the words "grant, bargain, and sell," in a mortgage given by a corporation to secure its issue of bonds, are not fraudulent representations as to existing encumbrances, as against a prior mortgagee and director of the corporation who does not sign the mortgage containing such covenants. *Mullanphy Sav. Bank v. Schott*, 401.
4. **CORPORATIONS — MORTGAGE — COVENANTS IMPLIED IN WORDS "GRANT, BARGAIN, AND SELL."** — The words "grant, bargain, and sell," in a corporate mortgage securing its issue of bonds, constitute a warranty that the land conveyed and mortgaged is free of all encumbrances, and also a warranty by the corporation to the purchasers of the bonds that there is no other mortgage made by it on the property; but such covenants bind the corporation alone, and are not binding upon its individual directors and stockholders. *Mullanphy Sav. Bank v. Schott*, 401.

CREDITORS' SUITS.

1. **CREDITOR'S BILL TO REACH PATENTS.** — The right acquired by a patentee upon the issuing of a patent is property subject to the claims of creditors, and may be reached by proper proceedings in equity and applied to the payment of his debts. *Vail v. Hammond*, 330.
2. **CREDITOR'S BILL COMPELLING TRANSFER OF PATENT.** — A court of equity may, at the instance of a creditor of a patentee, require him to transfer his patent to a receiver to be by the latter applied to the payment of debts. *Vail v. Hammond*, 330.

3. **PATENT, DISCRETION OF COURT TO ORDER SALE OF.** — Where a court of equity, upon a creditor's bill, finds that certain patents and other property were, by agreement of the parties, to be sold, and after paying plaintiff his advances, that the net proceeds were to be divided between plaintiff and defendant, it may require the defendant to transfer the patents to a receiver and direct the latter to sell them, and may, without committing reversible error, refuse the request of the defendant, that in case he should, within a reasonable time, pay all sums found due plaintiff, and all costs and expenses, then that the receiver should not sell the patents, and should convey one half thereof to defendant and the other to the plaintiff. *Vail v. Hammond*, 330.
4. **WHERE THE SAME COURT ADMINISTERS BOTH LAW AND EQUITY**, and may grant both legal and equitable remedies in the same action, a creditor may, upon the same complaint, recover judgment for his debt, and also the necessary equitable aid to obtain payment out of any property of the debtor which a law court could not reach. *Vail v. Hammond*, 330.

CRIMINAL LAW.

1. **CONFESSIONS MADE UNDER SUCH CIRCUMSTANCES THAT THEY ARE NOT ADMISSIBLE** against defendant as original evidence may nevertheless be proved for the purpose of impeaching the evidence given by him when he has voluntarily offered himself as a witness, and testified in his own favor. *Quintana v. State*, 730.
 2. **DEFENDANT AS A WITNESS.** — If the accused voluntarily testifies in his own behalf, he occupies the same position as any other witness, is liable to be cross-examined as to any matters pertinent to the issue, may be contradicted and impeached as any other witness, and is to be subjected to the same tests. He may, therefore, be impeached by proof that while in jail he made statements in conflict with his evidence as given at his trial. *Quintana v. State*, 730.
 3. **EVIDENCE OF THE GENERAL CHARACTER OF THE DEFENDANT** is admissible in his favor, in all criminal cases in which intent is necessary to constitute the offense with which he is charged. *Linnecum v. State*, 727.
 4. **NIGHT-WALKING.** — A WOMAN WHO STROLLS THE STREETS AT NIGHT for the unlawful purpose of picking up men for lewd intercourse, though without expectation of gain, is guilty of night-walking. *Stokes v. State*, 22.
- See **ABORTION; BAIL; FALSE PRETENSES; FORGERY; HOMICIDE; JUDGMENT, 8; LARCENY; LOTTERIES; MASTER AND SERVANT, 6, 7; NEW TRIAL; NUISANCE, 11; PERJURY; RAPE; RECEIVING STOLEN GOODS; SEDUCTION; WITNESSES, 2.**

DAMAGES.

1. **DAMAGES RECOVERABLE FOR AN INJURY ARE NOT LIMITED BY THE FACT THAT THE PERSON INJURED HAS RECEIVED SOME COMPENSATION** for the injury from another than the one liable in damages, wholly independent of any act of procurement of the latter, nor is it material that the latter was not guilty of any wrong or negligence, if the law has made him liable for the injury, in their absence. *Regan v. New York etc. R. R. Co.*, 306.
2. **CONTRACT WITH MUNICIPAL CORPORATION TO FURNISH WATER for its use and the use of its inhabitants** does not imply that there shall be no damages for a failure to comply therewith, from the fact that it contains

- a clause showing that the party agreeing to furnish the water may shut it off temporarily, for the purpose of making repairs, without being liable for damages, if he gives previous notice of his intention to so shut it off, and such repairs are made with diligence, and that if it is shut off more than five days, the rents for hydrants shall cease during the suspension, and that if he fails to furnish an adequate supply for five months, then the contract is to be void. *Paducah Lumber Co. v. Paducah Water etc. Co.*, 536.
3. WHERE A PARTY UNDERTAKES TO FURNISH WATER IN SUCH MODE AND QUANTITY that it may be used to extinguish fires in the city in which it is to be supplied, damages sustained by the destruction of buildings by the failure to so furnish such water is a natural and proximate consequence of such breach of the undertaking. *Paducah Lumber Co. v. Paducah Water etc. Co.*, 536.
 4. DAMAGES FOR BREACH OF A CONTRACT SHOULD BE SUCH as may fairly and reasonably be considered as arising naturally, — that is, according to the usual course of things from such breach, — or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of its breach. *Paducah Lumber Co. v. Paducah Water etc. Co.*, 536.
 5. LIQUIDATED DAMAGES FOR BREACH OF CONTRACT CANNOT BE FIXED BY PARTIES WHEN. — A clause in a contract providing that one of the parties thereto shall pay to the other three cents for every grain-bag which he refused or neglected to deliver on demand is void under sections 1670 and 1671 of the Civil Code of California; and the fact that it was understood and agreed between the parties, at the time of making the contract, that it would be impracticable and extremely difficult to fix the actual damages, owing to the nature of the case, will not preclude the court from determining whether or not it would be impracticable and extremely difficult to fix the actual damages. Whether or not a contract is such that from the nature of the case it would be impracticable or extremely difficult to fix the actual damage sustained by a breach thereof, is a question of fact, which is to be determined by the court in each particular case, and not by the arbitrary agreement of the parties. *Pacific Factor Co. v. Adler*, 102.
 6. EXEMPLARY DAMAGES ALLOWABLE WHEN MALICE AND OPPRESSION WEIGH IN CONTROVERSY. — Exemplary damages may be assessed when malice and oppression weigh in the controversy, and the offense is not punishable by the criminal law. *Louisville etc. R'y Co. v. Wolfe*, 436.
 7. INTEREST, WHEN ALLOWABLE IN ESTIMATING. — When one is liable for the destruction of property having a market value easily susceptible of proof, the damages recoverable by him are to be ascertained by adding to the market value of the property at the time of its destruction interest on the amount of such value to the date of judgment. *Regan v. New York etc. R. R. Co.*, 306.
- See ASSAULT; ATTACHMENT, 2; CONTRACTS, 4; DRAINS, 3; NUISANCE, 9, 10; REPLEVIN, 7; SLANDER, 4.

DEBTOR AND CREDITOR.

1. PAYMENT—WAIVER OF DEMAND. — When a debtor holds a specific sum under an honest mistake, his neglect or refusal to pay, to constitute a waiver of demand, must occur after his attention has been called to the

mistake, and after he has had reasonable time and opportunity to investigate the circumstances. *Goodell v. Brandon Nat. Bank*, 766.

2. SUBROGATION. — When one person discharges an obligation which primarily rests upon another, he should be subrogated to the place of the injured party or the creditor in respect to the party who is primarily liable, nor will the fact that the latter has not been guilty of any negligence or wrong-doing enable him to escape the demands of the party insisting upon the right to subrogation. *Regan v. New York etc. R. R. Co.*, 306.

See ASSIGNMENT; CORPORATIONS, 17, 18; CREDITORS' SUITS.

DECLARATIONS.

See ABORTION, 2; AGENCY, 1; CORPORATIONS, 17; EVIDENCE, 5, 6; HOMICIDE, 4-6; RECEIVING STOLEN GOODS, 7.

DEEDS.

1. ESCROW, WHAT IS NOT. — There can be no escrow until there is an actual contract of sale on the one side and of purchase on the other. Unless both parties have definitely assented to the contract, the instrument executed by the proposed grantor, though in form a deed, is neither a deed nor an escrow. *Miller v. Sears*, 176.
2. ESCROW. — IF A DEED IS GIVEN BY A GRANTOR TO A THIRD PERSON to be delivered when "everything is all right and perfect," and there is nothing to indicate that the matter is to be settled otherwise than by the future agreement of the parties, it is not an escrow; and the person having the custody of the deed is a mere depositary, subject to the future orders of the grantor, and without right to deliver the deed until notified by the grantor that the title is satisfactory to him. *Miller v. Sears*, 176.
3. ESCROW. — A DEED CANNOT BE REGARDED AS AN ESCROW if the title of the property remains to be settled to the satisfaction of the contracting parties. *Miller v. Sears*, 176.

See COVENANTS, 1, 2; HUSBAND AND WIFE, 11-15; INFANTS.

DEFENSES.

See BILLS AND NOTES, 2; NEGLIGENCE, 7, 8.

DEFINITIONS.

- "A false token." *Barton v. People*, 375.
- "A false writing." *Barton v. People*, 375.
- "Accidental means." *Insurance Co. v. Bennett*, 685.
- Alimony. *Adams v. Storey*, 392.
- "Anything." *Ballock v. State*, 559.
- "Children." *Mefford v. Dougherty*, 521.
- "Copyrighted." *Solis Cigar Co. v. Pozo*, 279.
- Dower. *Adams v. Storey*, 392.
- Escrow. *Miller v. Sears*, 176.
- "Exposure." *Davis v. Western etc. Ins. Co.*, 509.
- "Fabrica Tobacos." *Solis Cigar Co. v. Pozo*, 279.
- Forgery. *Commonwealth v. Wilson*, 528.
- "Grant, bargain, and sell." *Mullanphy Sav. Bank v. Schott*, 401.
- "Habana." *Solis Cigar Co. v. Pozo*, 279.
- "Habitual." *Stanton v. French*, 174.

- "Heirs of his body, so long as they hold and till the same." *Stansbury v. Hubner*, 584.
- "Indubitably certain." *Ross v. State*, 20.
- "Inducements." *State v. Switzer*, 789.
- "Issue." *Jackson v. Jackson*, 643.
- "Lawful heirs." *Tucker's Will*, 743.
- Lottery. *Ballock v. State*, 559; *Long v. State*, 606.
- Ministerial act. *American etc. Ins. Co. v. Fyler*, 337.
- Navigable streams. *Gaston v. Mace*, 848.
- Negotiable instruments. *McCaskill v. Connecticut Sav. Bank*, 323.
- Night-walking. *Stokes v. State*, 22.
- "Prescription." *Cobb v. Covenant M. B. Ass'n*, 619.
- "Railroad." *Katzenberger v. Lawo*, 681.
- "Representations." *State v. Switzer*, 789.
- "Seduction." *Pulnam v. State*, 738.
- "To her use and behoof forever." *Chase v. Ladd*, 614.
- Vice-principal. *Georgia P. R'y Co. v. Davis*, 47.

DEVISE.

1. **LIFE ESTATE.** — DEVISE TO G. AND TO HIS CHILDREN, the heirs of his body, does not vest in G. anything beyond a life estate, though the testator, in another clause, speaks "of the land I have devised to G." *Mefford v. Dougherty*, 521.
2. **CONSTRUCTION OF DEVISE.** — THE WORD "CHILDREN" imports only immediate descendants, and when used in a deed or will, the children take as purchasers, and are vested, if living, when the devise is to one and his children, with a present interest, or take under the devise as they come into being. *Mefford v. Dougherty*, 521.
3. **CONSTRUCTION OF DEVISE.** — If a will gives and devises to the testator's wife all his property, "giving her full power to sell or convey same by deed (part or all of it), the proceeds are to be used for her comfort, and otherwise, as she may think proper," but declares that whatever remains after her death, not specifically disposed of by her, is to be used for the benefit of his sons, such will vests in her an estate for life, with power to convey the fee by deed. *Kent v. Morrison*, 616.
4. **CONSTRUCTION OF DEVISE.** — If a testator gives and devises all his property to his wife, "to her use and behoof forever," but provides that if any of such property shall not be expended by her for her support and maintenance during her lifetime, it shall be disposed of in a manner designated in the will, it does not vest the property in her absolutely, but merely confers on her a right to use it for her support, and, if necessary for that purpose, to dispose of it during her life, leaving whatever she has not so disposed of to vest, after her death, in other persons, as provided in the will. *Chase v. Ladd*, 614.
5. **EFFECT OF CONDITION RESTRAINING ALIENATION.** — Where land is devised to one, "and the heirs of his body, so long as they hold and till the same," the condition in the devise is void, as an attempt to restrain alienation, and the devisees take an absolute estate freed of the condition. *Stansbury v. Hubner*, 584.

See WILLS.

DISCRETION OF COURT.

See BAIL, 2; CREDITORS' SUITS, 3.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOWER.

1. **DOWER IS THE PROVISION WHICH IS MADE BY LAW for the wife out of the lands and tenements of her husband for her support and maintenance after his death, but the wife cannot have both dower and that which is given in lieu of dower out of the same property.** *Adams v. Storey*, 392.
2. **DOWER AS CONTINUING RIGHT.** — The right of a wife to be endowed of a third part of all the lands whereof her deceased husband was seised of an estate of inheritance, at any time during the marriage, continues after divorce, unless she voluntarily relinquishes it, or it is barred for one of the causes prescribed by the statute, or she is, by some rule of law or equity, precluded or estopped from asserting it. *Adams v. Storey*, 392.
3. **ALIMONY AS A BAR TO DOWER.** — Where, upon a decree of divorce in favor of a wife, entered by consent, she is given an annuity for life, secured by a lien on certain real estate, and also by the husband's mortgage on the same, the annuity so decreed will be presumed to have been in lieu of dower, and if she receives such annuity during the husband's life and after his death, she will be estopped from claiming dower in the real estate securing her annuity. *Adams v. Storey*, 392.

DRAINS.

1. **CORPORATIONS — LIABILITY.** — A DRAINAGE DISTRICT, organized under a general statute providing that such districts when organized may levy special assessments upon the property benefited, is a public involuntary quasi corporation, without corporate liability to respond in damages to an individual member thereof injured by the tortious, negligent, or wrongful act of its officers in inundating his land. The only remedy of such member of the district is against its officers personally. *Elmore v. Drainage Commissioners*, 363.
2. **CORPORATIONS — DRAINAGE DISTRICT — PURPOSES OF ASSESSMENTS.** — Where a statute authorizes the organization of drainage districts and the levy of special assessments upon the land benefited, the power to make such assessments is referable to and included in the taxing power, and the purpose of such taxation must be public. Even the owner of the land benefited cannot be taxed to improve it, unless public considerations are involved. *Elmore v. Drainage Commissioners*, 363.
3. **CORPORATIONS — DRAINAGE DISTRICT — LIABILITY FOR INCREASING DAMAGES TO LAND TAKEN.** — Where a statute providing for the organization of a drainage district also makes provision for just compensation for all private property taken or damaged for public use prior to such taking, it will be presumed, after such district is organized, and in the absence of proof to the contrary, that each member of the district was fully compensated for lands taken for a ditch, and paid all damages consequent upon its construction for the purposes originally contemplated. If, however, by the enlargement of the district, an additional burden of water is thrown upon the land of a member to his detriment, the damages consequent upon such enlargement should be assessed and

paid by the district prior to the discharge of such additional water upon his land. *Elmore v. Drainage Commissioners*, 363.

See EASEMENTS, 1.

DRUNKENNESS.

See RAILROAD COMPANIES, 6, 7.

DUPLICITY.

See INDICTMENT.

DYING DECLARATIONS.

See HOMICIDE, 5, 6.

EASEMENTS.

1. **EASEMENT TO FLOW BACK-WATER UPON LANDS ACQUIRED BY MAINTENANCE OF EMBANKMENT FOR TWENTY YEARS.** — A servitude of drainage or flowage of water over adjacent lower lands may be lost by abandonment, and the servient estate may acquire a counter-easement to flow back-water upon the lands of the dominant estate by the erection and maintenance of an embankment impeding the natural drainage over the lower lands, and backing such surface water upon the higher lands; and where a railway company has, under claim of right, for a period of twenty years, maintained such an embankment continuously, without interruption, by suit or otherwise, no action can be maintained against it by the owner of such higher lands. *Railway Co. v. Mossman*, 670.
2. **PRESCRIPTION.** — LAPSE OF TIME DURING WHICH A DAM HAS BEEN MAINTAINED ACROSS A FLOATABLE STREAM by a riparian proprietor cannot give him any prescriptive right to maintain it as against and to the prejudice of the public, though it might give the right to keep up such dam as against another riparian owner. *Gaston v. Mace*, 848.

See PRIVATE WAYS.

EJECTMENT.

1. **OWNERSHIP OF GROWING CROPS.** — The fact that the successful plaintiff in ejectment may have his action for mesne profits does not affect his right to crops grown on the land wrongfully withheld from him. *McGinnis v. Fernandes*, 347.
2. **OWNERSHIP OF GROWING CROPS.** — As between the successful plaintiff in ejectment and the defendant or his tenant, the growing crop is a part of the realty, and belongs to the plaintiff; nor will the wrongful act of defendant or his tenant in severing the crop from the soil destroy such ownership. *McGinnis v. Fernandes*, 347.
3. **WRIT OF POSSESSION — WHO MAY BE DISPOSSESSED UNDER.** — A writ of possession against the husband, in an action of ejectment to which the wife is not a party, is ineffectual to dispossess her of land on which she lived, and which she had title to and claimed as her separate estate prior to the commencement of the action in ejectment. *Bushong v. Rector*, 817.

ELECTIONS.

1. **CONSTITUTIONAL LAW.** — Statute requiring that when a name of a candidate is erased from a ballot it must still be counted for him, unless the name of another person is substituted for it, or the words "no vote"

are written opposite the erasure, is not unconstitutional, as prescribing an educational qualification for the voter, or requiring him to disclose the secrecy of his ballot. *Rutledge v. Crawford*, 212.

2. **CANDIDATE NOT ESTOPPED TO CLAIM OFFICE BECAUSE HE REQUESTED ELECTION OFFICERS NOT TO DETERMINE RESULT.** — A candidate for office is not estopped from urging his claim to the office by the fact that he requested the officers of election not to determine the result of the election. *Johnston v. State*, 412.
3. **ELECTION CONTEST.** — **THOUGH THE STATEMENT FILED TO CONTEST AN ELECTION DOES NOT SHOW THAT THE CONTESTANT POSSESSES THE QUALIFICATIONS** required to make him eligible to the office contested, still, if it shows him to be an elector, and, as such, authorized to contest the election, he is entitled to a judgment annulling the election of the respondent. *Rutledge v. Crawford*, 212.
4. **A VOTE FOR A PERSON FOR AN OFFICE FOR WHICH HE IS NOT A CANDIDATE** may result either from mistake or from a frivolous exercise of the right of suffrage. Hence a vote cannot be counted as cast for him for the office for which he is a candidate. *Rutledge v. Crawford*, 212.
5. **BALLOTS — INDELIBLE PENCIL — RED INK.** — A ballot on which a printed name was erased, and another name written with an indelible pencil or with red ink, should be counted for the person whose name is thus written, though the statute provides that "when upon a ballot found in the ballot-box a name has been erased and another substituted therefor in any other manner than by the use of a lead-pencil or common writing-ink, the substituted name must be rejected, and that erased, if it can be ascertained from inspection of the ballot, must be counted. *Rutledge v. Crawford*, 212.
6. **BALLOTS.** — **WRITING A CANDIDATE'S NAME OPPOSITE AN OFFICE FOR WHICH HE IS NOT A CANDIDATE,** as where, when one is a candidate for judge, the name of the candidate for state senator is erased and that of the candidate for judge written in its place, does not entitle the latter to have the ballot counted for him for judge. *Rutledge v. Crawford*, 212.
7. **A BALLOT IS TO BE CONSTRUED AS ANY OTHER WRITING,** and while a resort to parol evidence of extrinsic circumstances may be had for the purpose of interpreting what would otherwise be doubtful, it cannot be shown by such, or any, evidence that the intention of the voter was anything different from what plainly appears on the face of the ballot. *Rutledge v. Crawford*, 212.
8. **BALLOTS, MARKS ON BACK OF.** — Under a statute declaring that "when a ballot found in any ballot-box bears upon the outside thereof any impression, device, color, or thing, or is folded in a manner to distinguish such ballot from other legal ballots found therein, it must be rejected," a ballot should not be rejected because there is on the outside of it a stain, piece of wax, or any other mark apparently placed there by accident, if there is nothing in the evidence to indicate that it was on the ballot for the purpose of distinguishing it from other ballots, or to impart knowledge of the person who voted it. *Rutledge v. Crawford*, 212.
9. **A BALLOT SHOULD NOT BE REJECTED** because there is on its back a faint type-impression of a portion of the face of a similar ticket, produced, when there is too much ink upon the type used in printing, by placing one ticket face downward upon the back of another which preceded it

from the press, if there is no evidence tending to show that the ticket was marked in this manner for the purpose of distinguishing it from other ballots. *Rutledge v. Crawford*, 212.

See INJUNCTION, 1; MANDAMUS, 2; PHYSICIANS AND SURGEONS, 1.

EMINENT DOMAIN.

See RAILROAD COMPANIES, 31.

EMPLOYER AND EMPLOYEE.

See MASTER AND SERVANT; STATUTES, 11, 12.

ENTIRETIES.

See HUSBAND AND WIFE, 1.

EQUITABLE ASSIGNMENT.

See TRADE-MARKS, 5.

EQUITY.

See CREDITORS' SUITS, 4; EXECUTION, 8; INSURANCE, 47; JUDGMENTS, 1-3; PHYSICIANS AND SURGEONS, 3.

ESCROW.

See DEEDS.

ESTOPPEL.

REPRESENTATION PROCURED BY FRAUD does not ordinarily create any estoppel, nor prevent the person making it from proving how it came to be made, and that it is not true. *McCaskill v. Connecticut Sav. Bank*, 323.

See BANKS AND BANKING, 1, 3; CORPORATIONS, 14; DOWER, 2; ELECTIONS 2; EVIDENCE, 1; HUSBAND AND WIFE, 13; INSURANCE, 25; LANDLORD AND TENANT, 1, 2; RAILROAD COMPANIES, 35.

EVIDENCE.

1. STATEMENT SET OUT IN COMPLAINT ADMISSIBLE IN EVIDENCE. — Where the plaintiff sets out in his complaint a certain sworn statement, he cannot object to its being read in evidence by the defendant. *Citizens' etc. Ry Co. v. Robbins*, 445.
2. JUDICIAL RECORDS OF OTHER STATES — AUTHENTICATION OF. — A state may authorize the reception in evidence of a judicial record of another state, though it is not authenticated, as required by the acts of Congress. *Thrasher v. Ballard*, 894.
3. EVIDENCE TO SHOW BIAS. — Where the plaintiff is a land-owner suing to recover for injuries suffered by the maintenance of a dam and reservoir, the transfer to him from his grantor of all claims for damages accruing to him while he owned the same land is not admissible for the purpose of proving bias. *Aldworth v. City of Lynn*, 608.
4. PHOTOGRAPH OF SCENE OF RAILWAY ACCIDENT ADMISSIBLE IN EVIDENCE. — It is not error to permit a witness to testify that a photograph introduced in evidence is a correct representation of a railway crossing at which an accident occurred. *Miller v. Louisville etc. Ry Co.*, 416.
5. RES GESTÆ. — DECLARATIONS OF AN IGNORANT NEGRO WOMAN, made from half an hour to an hour after she was injured, showing when,

how, and by whom the wound was inflicted, when she had not spoken to any one after her injury, are admissible as part of the *res gestæ*, after her death, on the trial of the person accused of killing her. *Lewis v. State*, 720.

6. **RES GESTÆ.** — TO CONSTITUTE DECLARATIONS A PART OF THE RES GESTÆ, it is not necessary that they were precisely coincident with the principal fact. If they sprang out of the principal fact, tend to explain it, were voluntary and spontaneous, and made at a time so near it as to preclude the idea of deliberate design, they may be regarded as contemporaneous, and admitted in evidence. *Lewis v. State*, 720.

7. **DEED OF TRUST — EVIDENCE TO CONTRADICT RECITALS.** — When a deed of land is made to one as assignee, and recites that it was executed "for and in consideration of the conditions of the assignment made this day for the benefit of the creditors of the" grantor, the recital is conclusive that the grantee took the property in trust, and not as a purchaser, and cannot be contradicted by parol evidence showing an intent to make an absolute conveyance of the property in payment of the debts due the grantee and other creditors. *McDermith v. Voorhees*, 286.

See **ABORTION**, 2, 3; **APPEAL AND ERROR**, 8, 9; **CARRIERS**, 3; **CORPORATIONS**, 13, 15, 17, 18; **FALSE PRETENSES**, 13, 14; **FORGERY**, 5; **FRAUDULENT CONVEYANCES**, 4; **HOMICIDE**, 4-7; **INSURANCE**, 4, 18, 28, 35, 59, 60; **LARCENY**, 6, 7; **NUISANCE**, 5, 6; **RAILROAD COMPANIES**, 19-34; **RAPE**; **RECEIVING STOLEN GOODS**, 2, 6, 7; **REPLEVIN**, 7; **SALES**, 5; **TRIAL**, 4, 5.

EXCEPTIONS.

See **APPEAL AND ERROR**, 1, 2.

EXECUTION.

1. **RIGHT OF CREDITOR TO ASCERTAIN WHETHER PROPERTY IS SUBJECT TO.** — Under the Colorado statute, every interest in land, whether legal or equitable, is subject to levy and sale under execution, and a judgment creditor may by action determine the interest of the judgment debtor in the property to be sold prior to the sale, and thus settle the title in advance thereof. *O'Connell v. Taney*, 275.
2. **CO-TENANCY — ENTIRE CHATTEL SUBJECT TO LEVY UNDER EXECUTION AGAINST ONE CO-TENANT.** — Replevin will not lie against an officer who has levied upon, taken possession of, and advertised for sale an entire chattel, the legal title to which is in co-tenants, under an execution against one of them. The rights of the other co-tenant are not affected in such case until the sale of the entire chattel. *Burton v. Kennedy*, 769.
3. **EXEMPTION.** — ONLY THOSE ARTICLES SPECIFIED IN THE STATUTE can be held as exempt from execution. Therefore, the bread-box of a peddler of bread, however necessary to his calling, is not exempt, when it is not specified in the statute among the things there enumerated as exempt. *Stanton v. French*, 174.
4. **EXEMPTION.** — THE WORD "HABITUAL," as used in a statute exempting the horse and wagon by which a debtor habitually earns his living, does not mean exclusively; and the fact that he may have, to a limited extent, applied his team to other uses, or that some part of his living may have come from some other avenue of industry, cannot deprive him of his rights as a peddler. *Stanton v. French*, 174.

5. **EXEMPTION. — PROPERTY PURCHASED BY A PENSIONER** with moneys received by him as arrears of his pension is exempted from execution, by virtue of the statute of the United States declaring that "no sum of money, due or to become due to any pensioner, shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the pension-office, or an officer or agent thereof, . . . but shall inure wholly to the benefit of such pensioner." *Crow v. Brown*, 501.
6. **FAILURE OF TITLE — DELAY IN DELIVERING DEED.** — Where the existence of a mortgage against land sold under execution, but not its foreclosure, is disclosed at the time of the sale, the purchaser is not relieved from the payment of the amount of his bid, although between the time of sale and of tendering the deed the equity of redemption has expired; nor will the fact that the officer making the sale delayed longer than the statutory period before tendering the deed relieve such purchaser, unless he has been prejudiced by such delay. *Stearns v. Edson*, 758.
7. **RETURN — STATUTE OF FRAUDS.** — The return of an officer on an execution under which he sells real estate is a sufficient memorandum to satisfy the statute of frauds. *Stearns v. Edson*, 758.
8. **EXECUTION SALES — CAVEAT EMPTOR.** — In sales of land under execution, the officer making them is not a party who can be charged as vendor. The rule *caveat emptor* applies, and on failure of title, the purchaser has no relief from the payment of his bid except by resort to equity. *Stearns v. Edson*, 758.
9. **EXECUTION SALE OF UNDIVIDED INTERESTS IN LAND VOID WHEN.** — A sale under execution of two undivided interests in a tract of land, under a joint judgment against the owners thereof, where such interests are sold together, is void. *Ballard v. Scruggs*, 703.

EXECUTORS AND ADMINISTRATORS.

1. **CORPORATE STOCK IS PERSONAL PROPERTY.** — Shares of stock in a corporation owned by a decedent at the time of his death are personal property, and upon his death descend to his heirs at law, subject to the right of his administrator to subject the same to sale in the manner prescribed by the laws of the state. *Citizens' etc. R'y Co. v. Robbins*, 445.
2. **ADMINISTRATOR'S SALE WITHOUT COMPLIANCE WITH ORDER OF SALE VOID.** — Where an administratrix obtains an order to sell shares of stock belonging to her intestate at private sale on good security, but she sells them upon the individual note of the purchaser without any security, and on a credit of ten years, when she had no power to give a credit exceeding twelve months, such sale is void and vests no title. *Citizens' etc. R'y Co. v. Robbins*, 445.
3. **TITLE TO PROPERTY SOLD BY ADMINISTRATOR UNDER ORDER OF COURT PASSES WHEN.** — In cases of private sales by administrators, where the order of the court does not require a confirmation, if the sale is made in substantial compliance with the order of the court, the title passes to the purchaser upon his compliance with the terms of the sale. *Citizens' etc. R'y Co. v. Robbins*, 445.
4. **SALES OF PERSONAL PROPERTY OF DECEDENT MUST BE MADE IN MANNER PRESCRIBED BY STATUTE.** — The common-law right of the administrator to sell and dispose of personal property of his intestate does not exist in Indiana. Sales of such property must be made in the manner prescribed

by its statutes upon the subject. In the absence of an order from the proper court, the sale must be public, and where the sale is private, under the order of the court, it must be made in substantial compliance with the order. *Citizens' etc. R'y Co. v. Robbins*, 445.

3. **PURCHASER IN GOOD FAITH NOT LIABLE TO DECEDENT'S ESTATE WHEN.** — Where an administratrix sells shares of stock belonging to her intestate's estate without complying with the order of sale, and the corporation whose shares of stock are thus sold illegally transfers such shares of stock to the purchaser, one who in good faith, and without any knowledge of the illegality in the surrender and cancellation of the original shares of stock, purchases from said purchaser the new certificates of stock is not liable to the estate of said intestate, but the remedy of such estate is against the corporation. *Citizens' etc. R'y Co. v. Robbins*, 445.

See **CONTRACTS**, 11-14.

EXEMPLARY DAMAGES.

See **DAMAGES**, 6; **RAILROAD COMPANIES**, 10.

EXEMPTIONS.

See **ATTACHMENT**, 1; **EXECUTIONS**, 3-5; **SET-OFF**; **WITNESSES**, 1.

FALSE PRETENSES.

1. **FALSE PRETENSES BY TWO—GUILT OF ONE WILL NOT SHIELD THE OTHER.** — Where two persons conspire together to accomplish an unlawful purpose, and one, by false pretenses, obtains money from the other, and parts with it in furtherance of the unlawful purpose, a prosecution will lie against him, on the complaint of the other party, for obtaining money under false pretenses, notwithstanding the guilt of the party complaining. *In re Cummins*, 291.
2. **FALSE PRETENSES OF EXISTING FACT.** — False representations that persons named had in the past entered into an arrangement and agreement to furnish money to pay the defendant's debts, by virtue of which he obtained the signature of the defrauded party to a promissory note, are indictable as false representations of an existing fact. *State v. Switzer* 789.
3. **FALSE PRETENSES SUFFICIENT TO DECEIVE—QUESTION FOR JURY.** — The question whether or not the false pretenses alleged were such as were calculated to mislead a person of ordinary prudence cannot be raised by demurrer, but must be determined by the jury under all the facts of the case. *State v. Switzer*, 789.
4. **PROMISSORY NOTE** is within the meaning of a statute making it a crime to obtain the money or other property of another by means of false pretenses. *State v. Switzer*, 789.
5. **LOSS TO VICTIM NOT ESSENTIAL.** — The *gravamen* of the crime of obtaining money or property by false pretenses is in obtaining a person's money or property by means of such pretenses with intent to defraud him, and does not depend upon the ultimate loss to the victim, or whether in fact he sustains any pecuniary loss or not. *State v. Switzer*, 789.
6. **INDICTMENT—SUFFICIENCY.** — An indictment for obtaining money or other property by means of false pretenses, alleging that defendant made such pretenses designedly and with intent to defraud, is sufficient

- without alleging that he knew the pretenses alleged to be false. *State v. Switzer*, 789.
7. **ALLEGATION IN INDICTMENT** that defendant obtained the signature to a note by means of false pretenses implies a further allegation of the delivery of the note to him. *State v. Switzer*, 789.
 8. **INDICTMENT ALLEGING THAT SIGNATURE TO NOTE** was obtained by false pretenses, and setting forth the note in full, need not allege that the false making of the note was punishable as forgery. *State v. Switzer*, 789.
 9. **INDICTMENT ALLEGING THAT SIGNATURE TO NOTE** was obtained by means of the false pretenses alleged is sufficient, and a further description of them as "inducements" and "representations" is surplusage. *State v. Switzer*, 789.
 10. **INDICTMENT — INTENT MUST BE ALLEGED.** — An indictment for obtaining a signature to a note by means of false pretenses must allege that such signature was obtained with design to defraud. *State v. Switzer*, 789.
 11. **INDICTMENT — SUFFICIENCY.** — An indictment for obtaining money or other property under false pretenses, framed in the words of the statute, properly setting forth the pretenses and alleging their falsity, is sufficient without averring that such pretenses were feloniously made. *State v. Switzer*, 789.
 12. **SUFFICIENCY OF INDICTMENT.** — An indictment for obtaining goods by false pretenses, charging that the accused, by falsely representing that he had money in bank, thereby induced another to accept a check in payment for goods sold and delivered, is sufficient. An additional averment that the accused represented that he would give a check different from the one given, though unnecessary, is not an averment that he issued such different check, and does not vitiate the indictment; and a further averment, characterizing the check issued as "a false token" and "a false writing" may be disregarded as surplusage, as it neither adds to nor detracts from the material allegation charging the gist of the offense. *Barton v. People*, 375.
 13. **EVIDENCE.** — On the trial of an indictment for obtaining goods by false pretenses, evidence that the accused agreed to pay cash, obtained from a certain bank, for goods upon delivery, but that upon delivery he gave the seller, without explanation, a check on said bank in payment, sufficiently establishes that he obtained the goods by representing that he had sufficient money in such bank to pay the check on presentation. *Barton v. People*, 375.
 14. **EVIDENCE.** — Under an indictment charging the obtaining of goods by false pretenses, proof that the goods were in the possession of an agent of the party defrauded, and named in the indictment as the owner, at the time they were obtained by the accused, is sufficient proof of the ownership of the goods, if the title of the party named is not disputed. *Barton v. People*, 375.

FELLOW-SERVANTS.

See MASTER AND SERVANT, 5.

FIRE INSURANCE.

See INSURANCE, 1-19.

FORECLOSURE.

See JUDGMENT, 7; MORTGAGES.

FOREIGN CORPORATIONS.

See CORPORATIONS, 21; JUDGMENT, 9; LIMITATIONS OF ACTION, 2; STATUTES, 7.

FORGERY.

1. **FORGERY NEED NOT BE THE DOING OF AN ACT IN THE NAME OF ANOTHER.** — The offender may be guilty of the false making of an instrument, although he signed his own name, if it is false in a material part, and calculated to induce another to give credit to it as genuine and authentic when it is false and deceptive. *Commonwealth v. Wilson*, 528.
2. **A SURVEYOR WHO EXECUTED, WITH INTENT TO DEFRAUD, A WRITING FALSELY CERTIFYING THAT A SURVEY** had been made by him, and giving the boundaries and the names of the chain-carriers, when in fact he did not make any survey whatever, is guilty of forgery, though he signed his own name thereto, if the certificate is one provided for by law, and would have possessed legal efficacy if genuine and authentic. *Commonwealth v. Wilson*, 528.
3. **DEFINITION OF.** — The false making or materially altering, with the intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy or the foundation of legal liability, is forgery. *Commonwealth v. Wilson*, 528.
4. **INDICTMENT.** — An indictment for forgery, or for uttering or attempting to utter as true any forged instrument, need not, under the statute, name the person intended to be defrauded, nor allege that the act was to the prejudice of another's right, but it must show that the instrument itself is of such character as to prejudice such right. *State v. Tingler*, 830.
5. **EVIDENCE TO SUPPORT CONVICTION.** — When the forged instrument is found in the hands of the accused in the county where he uttered or attempted to employ it as true, and this fact appears in proof, while it does not appear that the forgery was committed in another county, the evidence will support a verdict that the forgery was committed in the former county. *State v. Tingler*, 830.

FORMER JEOPARDY.

See JUDGMENT, 8.

FRANCHISES.

See RAILROAD COMPANIES, 28-30.

FRAUD.

PLEADING. — **FRAUD AND AN EXCUSE FOR NOT SOONER DISCOVERING IT** ARE SUFFICIENTLY DISCLOSED by a pleading stating that defendant was the guardian of plaintiff, whose father died the owner of a large number of cattle and of two tracts of land, but that defendant represented that such father had died insolvent; that the defendant sold the cattle and land and received the proceeds and converted them to his own use; that he filed an inventory as guardian, in which he did not show the

existence of such property nor the receipt of such proceeds, and in all his accounting as such fraudulently concealed their existence; that defendant was complainant's step-father, as well as his guardian, in whose family complainant was brought up; that he had implicit confidence in his guardian and believed all his statements concerning the property, and did not have any reason to question them until he had left the family of defendant, and was for the first time advised that his father had not died insolvent, but had left such cattle and lands, and that the same had been disposed of by defendant. *Lataillade v. Orena*, 219.

See AUCTION; CONTRACTS, 1; CORPORATIONS, 19; ESTOPPEL; FRAUDULENT CONVEYANCES; JUDGMENTS, 1; LARCENY, 3; LIMITATIONS OF ACTIONS, 6, 9-11.

FRAUDULENT CONVEYANCES.

1. **ASSIGNMENT CONTAINING SECRET TRUST.** — The effect of a recorded assignment of a patent right absolute in form, and based upon ample consideration, but intended merely as security for money advanced, is necessarily to mislead, deceive, and defraud creditors of the insolvent assignor; and as it contains a secret trust in his favor, it is fraudulent and void as against them. *Beidler v. Crane*, 349.
2. **GUILTY KNOWLEDGE OF ASSIGNEE.** — Even though an assignee of property pays a valuable and full consideration, yet if the assignor assigns for the purpose of defeating the claims of his creditors, and the assignee knowingly assists in effectuating such fraudulent intent, or even has notice thereof, he will be regarded as a participator in the fraud. *Beidler v. Crane*, 349.
3. **FRAUDULENT CONVEYANCES, WHEN UPHELD AS TO CONSIDERATION ADVANCED.** — Where an assignment of property is set aside solely on the ground that it is constructively fraudulent as to creditors, it will be upheld to the extent of the actual consideration, and be vacated only as to the excess; but when it is fraudulent in fact, it is absolutely void as to creditors of the assignor, and is not permitted to stand for any purpose of reimbursement to the assignee. *Beidler v. Crane*, 349.
4. **PROOF OF FRAUD.** — Though the fact that an assignment absolute in form is intended merely as security will only justify the deduction that it is constructively fraudulent, yet when the fraudulent assignee claims that his ownership of the property is absolute, and that the assignor has no interest therein, it affords strong proof of actual fraud. *Beidler v. Crane*, 349.
5. **RIGHTS OF CREDITORS UNDER ASSIGNMENT OF PATENT RIGHT.** — The right acquired by a patentee on the issue of a valid patent right is properly subject to the claims of creditors, and may be reached by creditor's bill; and when the patentee assigns the patent to a fraudulent assignee with intent to defraud his creditors, and a corporation is organized on the basis of the patent, and shares of stock are issued to the assignee thereof, such shares are subject to the claims of the creditors of the insolvent assignor. *Beidler v. Crane*, 349.

See CHATTEL MORTGAGES, 2; HUSBAND AND WIFE, 6, 7.

GARNISHMENT.

See ASSIGNMENT, 3; ATTACHMENT.

GIFTS.

See HUSBAND AND WIFE, 4; STATUTES, 3, 4.

GROWING CROPS.See **EJECTMENT**, 1, 2.**GUARDIAN AND WARD.**

THE SETTLEMENT OF A GUARDIAN'S ACCOUNTS by a probate court does not conclude his ward as to property fraudulently withheld from the account. Hence, after such settlement, a bill in equity may be sustained by the ward against his guardian to compel the latter to account for property which he fraudulently withheld from the account, and the existence of which he concealed from the court. *Lataillade v. Orena*, 219.

See **FRAUD; INSANE PERSONS; PLEADING**, 2.**HOMESTEAD.**See **JUDGMENT**, 7; **PUBLIC LANDS**.**HOMICIDE.**

1. **INTENT.** — If one brother comes to the assistance of another, who is engaged in a fight, and whose adversary is seeking to obtain a club with which to strike the brother with whom he is fighting, the assisting brother is not chargeable with the murderous intent of the fighting brother, unless it be shown that he knew, or might reasonably have known, of such intent. *Snell v. State*, 723.
2. **SELF-DEFENSE.** — A man, when upon his own land, is not to be regarded as at bay, so as to be under no duty to yield further to an assailant, unless he is in his house, or within the curtilage or space usually used and occupied for the purposes of the house. When beyond its precincts, though upon his own land, he is under the duty to retreat, when retreat with safety to himself is practicable. Hence he is not justified in committing a homicide simply from the fact that he had retreated to and was upon his own land, but not within the curtilage. *Lee v. State*, 17.
3. **DEFENSE OF ANOTHER.** — ONE BROTHER is justified in interfering in the defense of another, when the latter is in an angry struggle with a third person, who attempts to possess himself of a club with the apparent purpose of using it on the brother. The brother thus interfering is justified not only in seeking the club, but, if necessary for the protection of his brother, in striking with it. *Snell v. State*, 723.
4. **DECLARATIONS OF ONE WHO HAS KILLED ANOTHER, SHOWING A WISH TO KILL OTHERS** because of their friendship with the decedent, are admissible in evidence for the purpose of proving malice. *Lewis v. State*, 720.
5. **EVIDENCE CONTRADICTING DYING DECLARATIONS.** — It is not error to refuse to permit a witness to state that the decedent had made statements different from his dying declarations, if the witness is unable to state the substance of the alleged contradictory statements. *Snell v. State*, 723.
6. **DYING DECLARATIONS, WHAT ADMISSIBLE AS.** — Declarations made by one after receiving an injury, reduced to writing, and sworn to by him at a time when he did not apprehend death, are admissible in evidence as dying declarations, if he, after becoming conscious of approaching death, and without hope of recovery, refers to and reaffirms such statements, though they are not then shown or read to him. *Snell v. State*, 723.
7. **CONFESSIONS — INSTRUCTIONS.** — Where the evidence against one on trial for murder consists mainly of admissions made by him soon after the

homicide, and the confessions contain exculpatory or mitigating circumstances which are not shown by other evidence to be false, the jury should be instructed that the whole of the admissions or statements are to be taken together, that the state is bound by them, unless they are shown by the evidence to be untrue, and that they are to be taken into consideration by the jury in connection with all the other facts and circumstances in the case, and if not so instructed, the judgment should be reversed. *Jones v. State*, 715.

8. **REASONABLE DOUBT.** — A CHARGE INSTRUCTING the jury in a murder case to acquit, unless "indubitably certain" of defendant's guilt, or if from the evidence they are unable to say "where the truth indubitably lies," is properly refused, as not sufficiently defining reasonable doubt, and as making any possible speculative or imaginary doubt sufficient to acquit. *Ross v. State*, 20.
9. **JURY TRIAL — CRIMINAL LAW.** — The failure of the judge to instruct the jury upon the law of self-defense is an error calling for the reversal of a judgment of conviction, when there is evidence in the case fairly presenting the issue of self-defense. *Snell v. State*, 723.

See ABORTION.

HUSBAND AND WIFE.

1. **ENTIRETIES, LAND HELD BY, NOT SUBJECT TO HUSBAND'S DEBTS.** — Where real estate is conveyed to husband and wife jointly, they take as one person, and the husband has no interest, either in the fee or in the usufruct, subject to execution in payment of his sole debts. *Corinth v. Emery*, 780.
2. **COMMUNITY LANDS — SALE OF, BY WIDOW.** — If, where the law of community property prevails, real property is purchased with community assets, and a conveyance thereof taken in the name of the widow, it, upon the death of the husband, vests in the widow and children as tenants in common, and a sale by her does not transfer or otherwise affect the interest of the children, nor give them any right to have an accounting of the proceeds of the sale. *Lataillade v. Orena*, 219.
3. **AGREEMENT BETWEEN HUSBAND AND WIFE** that the latter will hold personal property received by him from her father's estate, free from his marital rights, in trust for her as her separate estate, will be upheld in equity against his heirs and distributees. *Veal v. Veal*, 534.
4. **A NOTE GIVEN BY A HUSBAND TO HIS WIFE** for moneys received by him for her from her father's estate, under an agreement that he will hold such moneys in trust for her as her separate estate, is valid and binding upon his heirs and representative as evidence of such trust and enforceable as such. *Veal v. Veal*, 534.
5. **SALES FROM HUSBAND TO WIFE — CHANGE OF POSSESSION.** — To render a sale of personal property by a husband to his wife valid against the vendor's creditors, there must be an apparent and exclusive change of possession from the vendor to the vendee. A statute designed to enable married women to make contracts the same as if sole, and to protect their personal estate from their husband's creditors, does not affect this rule. *Wheeler v. Selden*, 771.
6. **FRAUDULENT CONVEYANCES BETWEEN HUSBAND AND WIFE — EVIDENCE.** — As against the creditors of a husband, the law will not, from the mere delivery by the wife of her money to her husband, or from the permitted receipt by him of her separate income, imply a promise by him to repay

her, but will exact a promise, expressed in terms, or implied from circumstances clearly proving that they dealt with each other as debtor and creditor. *Kanawha Valley Bank v. Atkinson*, 806.

7. **FRAUDULENT CONVEYANCES FROM HUSBAND TO WIFE.** — Where a wife knowingly permits her husband to mingle her money and the proceeds of her separate estate with his own, and to use it in his business for years, without requiring any note therefor from him, or keeping or having kept any account thereof, and after the lapse of the period of limitation from the time that the money was thus received, the insolvent husband purchases land in the name of the wife, claimed by them to have been paid for with the money thus received, and they afterwards give a joint deed of trust thereto to secure the debt of the husband, the land so purchased is subject to a judgment rendered prior to the purchase in favor of the husband's creditor, after the satisfaction of the trust deed. *Kanawha Valley Bank v. Atkinson*, 806.
8. **DIRECT CONVEYANCE OF LAND TO ONE ANOTHER.** — Under the Colorado statute, the husband and wife may deal in reference to their joint property the same as though no marital relation existed between them. Either may convey directly to the other, and in the absence of fraud a good title may be conveyed, and if the title is held in the name of one only, that one, in equity, may be declared a trustee for and as to the interest of the other. *O'Connell v. Taney*, 275.
9. **WIFE AS TRUSTEE OF HUSBAND — LIABILITY OF HIS INTEREST IN LAND FOR DEBTS.** — In an action against a wife as trustee of her husband's interest in land held in her name alone, to compel her to convey his interest therein to him, so as to subject it to the payment of his debts, an allegation of his insolvency is unnecessary. *O'Connell v. Taney*, 275.
10. **JUDGMENT AGAINST A MARRIED WOMAN** upon a claim not authorizing personal judgment against her is void, and no proceeding to reverse or vacate it is necessary, to entitle her to successfully resist its enforcement, where it does not appear that she set up her coverture as a defense to the action, and that the court, before rendering judgment passed upon such defense. *Spencer v. Parsons*, 555.
11. **DEED OF MARRIED WOMAN — DEFECTIVE ACKNOWLEDGMENT — EFFECT ON SECOND PURCHASER.** — A married woman's deed conveying her land, made during coverture, but defectively acknowledged, is void as to a purchaser from her after her husband's death with notice of the former deed. He does not take as trustee for the first purchaser, but may maintain ejectment against him or his vendee. *Central Land Co. v. Laidley*, 797.
12. **DEED OF MARRIED WOMAN — DEFECTIVE ACKNOWLEDGMENT — RATIFICATION.** — Where a married woman's deed made during coverture is void because defectively acknowledged, she cannot ratify it by mere admissions or recitals in other deeds or pleadings, or by other acts *in pais*. She can ratify it only by attaching a proper and sufficient acknowledgment thereto, or by executing another deed properly acknowledged. *Central Land Co. v. Laidley*, 797.
13. **DEED OF MARRIED WOMAN — DEFECTIVE ACKNOWLEDGMENT — ESTOPPEL.** — Where a married woman's deed of her property, made during coverture, is void because defectively acknowledged, it cannot constitute an estoppel against her or her vendee after her husband's death, although the first purchase-money was received and invested in land in her hus-

band's name, to which she asserted and acquired title during coverture. *Central Land Co. v. Laidley*, 797.

14. **DEED OF MARRIED WOMAN — DEFECTIVE ACKNOWLEDGMENT — LIABILITY OF SECOND PURCHASER TO REFUND FIRST PURCHASE-MONEY.** — Where a married woman's deed is void because defectively acknowledged, and she conveys to a second purchaser after her husband's death, his title is perfect. He cannot be compelled to refund the purchase-money paid by the first purchaser, nor can it be charged on the land. *Central Land Co. v. Laidley*, 797.
15. **DEED OF MARRIED WOMAN — DEFECTIVE ACKNOWLEDGMENT — STATUTE OF LIMITATIONS AGAINST WIFE.** — Where, in land conveyed directly to the wife, her husband is thereby vested with a life estate therein, and the husband and wife convey it to a party by deed which is void as to the wife, because defectively acknowledged, the purchaser is entitled to the possession until the death of the husband, and until then the wife or her grantee has no right of action to recover the possession; consequently the statute of limitations does not begin to run against them until his death. *Central Land Co. v. Laidley*, 797.

See DOWER; EJECTMENT, 3; MARRIAGE AND DIVORCE; PARENT AND CHILD.

IMPROVEMENTS.

See LANDLORD AND TENANT, 1.

IMPUTED NEGLIGENCE.

See NEGLIGENCE, 9.

INDICTMENT.

1. **DUPPLICITY.** — An information which charges in a single count the larceny of two distinct articles of personal property belonging to two different persons, without alleging that the property of the two owners was stolen at the same time and by the same act, is bad for duplicity. *Joslyn v. State*, 425.
2. **INDICTMENT NOT BAD FOR DUPPLICITY WHEN.** — An indictment is not bad for duplicity because it charges an accessory before the fact as a principal. *Rhodes v. State*, 429.

See ABORTION, 1; FALSE PRETENSES, 6-12; FORGERY, 4.

INFANTS.

INFANT'S DEED WITHOUT CONSIDERATION VOID. — An infant's deed of land, made without consideration, or for a merely nominal consideration, is absolutely void, and vests no title in the grantee. *Robinson v. Coulter*, 708.

See COVENANTS, 1; NEGLIGENCE, 5-8; PARENT AND CHILD.

INJUNCTION.

1. **ELECTIONS — JURISDICTION.** — An injunction will not issue to restrain county commissioners or other proper officers from certifying to the governor the result of their canvass of the county vote for a representative in Congress. *Alderson v. Commissioners*, 840.
2. **INJUNCTION AGAINST PERFORMANCE OF AN OFFICIAL DUTY IS VOID.** — An injunction will not lie to restrain the secretary of state from delivering to the speaker of the house of representatives the sealed election returns.

for governor properly transmitted to him, and if granted, will be treated as a nullity. Consequently a writ of prohibition will not lie in such case against a *mandamus* proceeding under a writ improperly granted to compel the delivery of such returns, when the only ground relied upon by the petitioner for the writ of prohibition is the fact that he is the plaintiff in the injunction which has been disregarded. *Fleming v. Guthrie*, 792.

3. **WRIT OF POSSESSION — WHEN MAY BE ENJOINED.** — An injunction will lie to restrain the execution of a writ of possession as to a wife's separate estate, when such writ issued in an action in ejectment against her husband to which she was not a party. *Bushong v. Rector*, 817.

See **LIBEL; TRADE-MARKS**, 8.

INSANE PERSONS.

MORTGAGE — POWER OF GUARDIAN OF INSANE PERSON TO MAKE. — Under the statutes of Massachusetts, a guardian of an insane person has authority to make any election or waiver, and to do any other act which his ward might have done but for his insanity, and may therefore exercise a power to mortgage conferred by a will on such ward. *Kent v. Morrison*, 616.

INSTRUCTIONS.

See **APPEAL AND ERROR**, 10-14; **HOMICIDE**, 7-9; **SEDUCTION**, 3; **SLANDER**, 4; **TRIAL**, 6.

INSURANCE.

1. **FIRE INSURANCE — CONDITION IN A POLICY OF INSURANCE EXEMPTING THE INSURER FROM LIABILITY IF ANY CHANGE TAKES PLACE IN THE TITLE OR POSSESSION** is not violated by a lease of the property and a taking possession by a tenant, when the application for insurance states that the property is to be occupied by a tenant for hotel purposes, and the insurer had full knowledge, before issuing the policy, of the purpose for which the building was being constructed, and that it was to be occupied by a tenant. No particular tenant being named in the application, the issuing of the policy was a consent to the occupancy of any tenant whom the assured should select. *Smith v. Phoenix Ins. Co.*, 191.
2. **A CONDITION IN A POLICY OF INSURANCE AGAINST ANY CHANGE IN THE TITLE OR POSSESSION** of property is not broken by an agreement between its lessor and lessee that the former will sell and the latter will buy the property at the expiration of the lease. *Smith v. Phoenix Ins. Co.*, 191.
3. **PREMIUM MUST BE PAID BACK IF RISK NEVER ATTACHED.** — Where no risk has ever attached under a policy of fire insurance, the insurer must return the premium paid, provided the assured has been guilty of no fraud. *Jones v. Insurance Co.*, 706.
4. **EVIDENCE THAT THE PLAINTIFF WAS VERY POOR AND NEEDY** should not be admitted to support an inference that his poverty might have led him to commit arson to obtain the amount for which his property was insured. *Deitz v. Providence etc. Ins. Co.*, 908.
5. **A BREACH OF CONDITION OCCURRING AFTER THE COMMENCEMENT OF AN ACTION** on a policy of insurance, such, for instance, as false swearing, cannot operate to defeat the action. *Deitz v. Providence etc. Ins. Co.*, 908.
6. **CONDITION AGAINST CHANGE IN EXPOSURE.** — If a policy of insurance, issued upon ear-corn in two cribs, contains a condition declaring that it

- shall be void "if there be any change in the exposure by the erection or occupation of adjacent buildings, or by any means whatever in the control or knowledge of the assured," such condition is violated and the policy avoided if he caused a sheller, operated by steam, and an engine and boiler, furnishing the power, to be brought quite near the cribs, and the corn was destroyed by fire caused by the proximity of the engine to the cribs. *Davis v. Western Home Ins. Co.*, 509.
7. **DEFINITION.** — THE WORD "EXPOSURE," as used in policies of insurance, indicates danger of destruction or injury to the property insured from external sources not inherent in the property itself. *Davis v. Western Home Ins. Co.*, 509.
 8. **FALSE STATEMENT CONCERNING OCCUPATION OF PREMISES AVOIDS POLICY.** — The holder of a policy of insurance on a dwelling-house described in the policy as occupied by good tenants cannot recover for a loss, if such house was in fact vacant when the policy was issued. Such statement is a warranty; and to entitle the insured to recover, it must have been true, although it was made in ignorance, and without any desire to misrepresent any of the facts. *Boyd v. Insurance Co.*, 676.
 9. **WAIVER OF WARRANTY OF OCCUPATION OF INSURED PREMISES, WHAT NECESSARY TO CONSTITUTE.** — If a policy of insurance is void at its inception because it contains a warranty that the premises insured were occupied, when in fact they were vacant, a subsequent notice to the insurer that they were vacant at the time of the giving of the notice cannot give life to the policy; and the consent of the insurer to the vacancy will not constitute a waiver by him of the forfeiture caused by the premises not being occupied when the policy was issued, unless such consent was given with full notice of all the facts. *Boyd v. Insurance Co.*, 676.
 10. **REQUIREMENT OF PROOFS OF LOSS NOT WAIVER OF OTHER DEFENSES.** — An insurer, by requiring proofs of loss stipulated for in the policy, does not waive his right to set up other defenses, although the insured may have incurred expense in furnishing the required proofs. *Boyd v. Insurance Co.*, 676.
 11. **NOTICE OF CONCURRENT INSURANCE.** — IF THE AGENT OF THE INSURER KNOWS when he receives the application for insurance that the assured is desiring and applying for concurrent insurance in excess of that permitted by the policy, this knowledge is imputed to the insurer, and precludes it from maintaining a defense founded upon the fact that additional insurance was finally obtained. *Hagan v. Merchants' etc. Ins. Co.*, 493.
 12. **INSURANCE CORPORATION IS BOUND BY THE KNOWLEDGE OBTAINED BY ITS AGENTS.** *Hagan v. Merchants' etc. Ins. Co.*, 493.
 13. **MISTAKE IN WRITING NAME OF PARTY WHOSE PROPERTY IS INSURED.** — If a policy of insurance is written in the name of the husband, through a mistake of an agent of the insurer, or of his clerk, who intended to write it in the name of the wife, whom he knew to be the owner of the property, an action may be sustained thereon by the husband for the use of the wife, though the policy contains a provision declaring that if the property is held in trust, or by leasehold or other interest not amounting to absolute or sole ownership, it must be so represented to the company and expressed in the policy in writing, and that the company will not be bound by any act or any statement made to or by any agent or other person which is not contained either in the

policy or in the written application on which the insurance was based. *Deitz v. Providence etc. Ins. Co.*, 908.

14. **WAIVER OF PROOFS OF LOSS.**—If an insurance company, without making any objection to the absence of proofs of loss, writes to the assured that, "We don't intend to look any further into the matter, and we don't deny our liability, nor do we admit it," the proof of loss is waived. *Deitz v. Providence etc. Ins. Co.*, 908.
15. **CLERKS OF AGENTS.**—**MISTAKE OF A CLERK** of an agent of the insurer in transcribing the policy is a mistake of the agent himself, and the obligations of the insured are the same as if the agent had made the mistake. *Deitz v. Providence etc. Ins. Co.*, 908.
16. **CLERK OF AGENT.**—Insurance agents are not bound to attend to all the details of their business in person. They may authorize their clerks to contract for risks, deliver policies, collect premiums, take payments of premiums in cash or security, and to give credit or demand cash. *Deitz v. Providence etc. Ins. Co.*, 908.
17. **PLEADING.**—**THE EXECUTION OF A POLICY OF INSURANCE IS NOT PUT IN ISSUE** by an answer denying that the policy as set out in the complaint is the policy issued by the defendants, "for that the same has been changed and altered, without their knowledge and consent, since its delivery," and further specifying the respects in which it has been so altered. Such policy is therefore receivable in evidence on behalf of the plaintiff without proving its execution, and without evidence concerning the alleged alterations. *Hagan v. Merchants' etc. Ins. Co.*, 493.
18. **PAROL EVIDENCE** that proof of loss was prepared and sent to the insurer is admissible, and if there is no issue as to the form or sufficiency of the notice or proof, there is no necessity of evidence of the contents of either, and the admission of an alleged copy cannot prejudice the insurer, nor afford him any ground for reversal. *Hagan v. Merchants' etc. Ins. Co.*, 493.
19. **COUNTERCLAIM BASED UPON A PREMIUM NOTE** is not sustainable when the promise in the note is to pay a designated sum "in such portions and at such times as the directors of such company, agreeably to their act of incorporation and by-laws, may require," unless the directors have declared such notes or some portion thereof due and payable. *Hagan v. Merchants' etc. Ins. Co.*, 493.
20. **LIFE INSURANCE—INSURABLE INTEREST—DEBT, THOUGH BARRED BY STATUTE OF LIMITATIONS, GIVES, IN LIFE OF DEBTOR.**—A debt, even though not legally collectible, by reason of the bar of the statute of limitations, gives to the creditor an insurable interest in the life of his debtor. *Curtiss v. Aetna Life Ins. Co.*, 114.
21. **INSURANCE POLICY—ASSIGNMENT AS COLLATERAL SECURITY TO ONE HAVING NO INSURABLE INTEREST.**—A policy of life insurance issued to a creditor of the assured may be assigned by such creditor as collateral security, and the assignee may enforce payment of the policy, although at the time of the assignment he had no insurable interest in the life of the assured, and notwithstanding the policy expressly provides that any claim made by an assignee shall be subject to proof of interest. An assignment as collateral security does not come within the meaning of such provision. The assignee in such case is a mere trustee for the assured. *Curtiss v. Aetna Life Ins. Co.*, 114.
22. **INSURABLE INTEREST—WHETHER ASSIGNEE HAS, IMMEDIATELY AFTER LOSS.**—After a loss and fixed liability have attached upon a policy of

- life insurance, it is of no concern whatever whether an assignee has or has not an interest in the life insured. *Curtiss v. Aetna Life Ins. Co.*, 114.
23. **INSURABLE INTEREST — CONTRACT TO ADVANCE MONEY TO PERSON GIVES, IN HIS LIFE.** — A binding contract by one person to advance money to another on demand gives to the former an insurable interest in the life of the latter. And if such an agreement, to be valid, must be in writing, an allegation in a pleading that alleges that it was so agreed must be held to imply that it was so agreed in writing. *Curtiss v. Aetna Life Ins. Co.*, 114.
24. **INSURANCE POLICY IS INSTRUMENT IN WRITING EXECUTED IN THIS STATE WHEN.** — A policy of life insurance issued by an insurance company of another state, which expressly provides that it shall not be operative until countersigned by the general agent of the company in this state, and which is so countersigned, is a written contract executed in this state within the meaning of the statute of limitations. *Curtiss v. Aetna Life Ins. Co.*, 114.
25. **INSURANCE COMPANY ESTOPPED FROM ALLEGING MISREPRESENTATION AS TO INSURABLE INTEREST WHEN.** — Although it does not appear that the creditor of a person whose life is insured was, at the date of the policy, bound by a written contract to advance the amount of the policy, if it does appear that future advances were promised, that the person whose life was insured had made a written acknowledgment of a considerable subsisting indebtedness, that a full and correct statement of all the facts as they existed was made to the company's agent, that the company continued to receive the premiums with knowledge of the facts, and that the full amount of the policy was finally advanced by the creditor, the company will be estopped from alleging a misrepresentation of an insurable interest to the full amount of the policy. *Curtiss v. Aetna Life Ins. Co.*, 114.
26. **CONSTRUCTION OF POLICY.** — A contract of insurance is to be construed as a whole, so as to receive a reasonable interpretation, and the risk is not to be extended beyond what is fairly within the terms of the policy. All conditions involving forfeitures or exemptions are, however, to be construed strictly against the insurer, and most favorably for the insured. *Duran v. Standard etc. Ins. Co.*, 773.
27. **QUESTIONS RELATING TO POLICY IN ANOTHER COMPANY NOT RELEVANT WHEN.** — In an action by the administratrix of the insured upon a life insurance policy, the defendant company cannot properly question the plaintiff as to another policy in another company held by the deceased, and as to the payment of premiums thereon. *Murray v. Home Ben. L. Ass'n*, 133.
28. **PRESUMPTION AGAINST SUICIDE AND MURDER IN CASE OF VIOLENT DEATH OF INSURED.** — In an action on a policy of life insurance, where the violent death of the insured is proved, but there is no direct proof of the manner of his death, the presumption of law is, that he did not commit suicide, and was not murdered; but either of these presumptions may be overcome by facts and circumstances which establish the contrary. *Insurance Co. v. Bennett*, 685.
29. **LIFE INSURANCE POLICY, CLAUSE IN, EXEMPTING FROM LIABILITY FOR INJURY FROM UNLAWFUL ACT, HOW CONSTRUED.** — A provision in a policy of life insurance exempting the insurer from liability for injuries to the insured while engaged in or in consequence of some unlawful act

does not extend to exempt the insurer from liability because of the infraction of law by the insured, when the act has no connection with the injury, or when the act is in violation of some obligation of morality or rule of policy not recognized or adopted as law. Living in fornication is not an unlawful act, unless it is accompanied with circumstances of notoriety or publicity; and the fact that the insured was so living at the time of his death does not exempt the insurer from liability under this clause. *Insurance Co. v. Bennett*, 685.

30. **LIFE INSURANCE POLICY, CLAUSE IN, EXEMPTING FROM LIABILITY IF INSURED KILLED IN QUARREL, HOW CONSTRUED.** — A clause in a policy of life insurance, providing that "if death occurs from assault provoked by quarreling, no recovery can be had," must have a reasonable construction, and the death of the insured cannot be regarded as coming within its meaning, unless it occurred as the result of a quarrel provoked by himself, and of so serious a nature that he might reasonably have expected that anger would be thereby aroused, and injury inflicted. It is not every frivolous controversy that is a quarrel within the meaning of such a clause. *Insurance Co. v. Bennett*, 685.
31. **LIFE INSURANCE POLICY — CLAUSE IN, REQUIRING DIRECT AND POSITIVE PROOF OF CAUSE OF DEATH, HOW CONSTRUED.** — In construing a clause in a policy of life insurance, which provides that "the insurance shall not be held to extend to any cause of death, the nature, cause, or manner of which is unknown or incapable of direct and positive proof," the court may, in a case where there is circumstantial, but no direct, evidence of the manner of the death of the insured, charge the jury that they may find any fact proven which may rightfully and reasonably be inferred from the evidence. *Insurance Co. v. Bennett*, 685.
32. **LIFE INSURANCE POLICY — "ACCIDENTAL MEANS" OF DEATH WITHIN MEANING OF CLAUSE IN.** — Where a policy of life insurance does not contain a provision in terms against a claim under the policy if the death was caused by intentional injury inflicted by the insured, or any other person, but contains merely a provision that the policy only covers injuries effected through "accidental means," an injury not anticipated, and not naturally to be expected by the insured, though intentionally inflicted by another, is an accidental injury within the meaning of the contract. *Insurance Co. v. Bennett*, 685.
33. **BENEFIT SOCIETY — CERTIFICATE AS CONTRACT OF INSURANCE.** — The Ancient Order of United Workmen, so far as it is engaged in the business of life insurance, is to be treated in law as a mutual life insurance company; and a certificate of membership and insurance therein is to be regarded as a written contract, and, so far as it goes, it is the measure of the rights of all parties. *Chartrand v. Brace*, 235.
34. **INSURANCE IN BENEFIT SOCIETY TREATED AS WILL.** — A policy of life insurance in a mutual benefit society is in the nature of a testament; and in construing it, the court will, as far as possible, treat it as a will. *Chartrand v. Brace*, 235.
35. **REPRESENTATIONS.** — Where one asserts that certain statements are true, and if not true, that this fact shall avoid a policy of insurance, the question whether they were actually material is not important, as the parties have the right to make their truth the basis of the contract; but if the applicant merely averred that the statements were true to the best of his knowledge and belief, then the policy cannot be avoided on ac-

- count of them, unless he did not know or believe them to be true. *Cobb v. Covenant Mut. Ben. Ass'n*, 619.
36. **NEGATIVE ANSWER TO THE QUESTION, "HAVE YOU PERSONALLY CONSULTED A PHYSICIAN,** been prescribed for, or personally treated within the past ten years?" will avoid a policy of insurance if the applicant had, within the time named, being, as he supposed, in need of a physician, gone to one for the purpose of consulting him as to what was the matter, had an interview, answering questions, and receiving aid, advice, or assistance from him. The question thus answered in the application should not be considered as referring to any specific disease. If the applicant had consulted a physician, who had prescribed for him, and administered a hypodermic injection of morphine, he was personally treated within the meaning of the interrogatory. *Cobb v. Covenant Mut. Ben. Ass'n*, 619.
37. **FORFEITURE FOR DEFAULT OF ASSURED WAIVED BY RECOGNIZING CONTINUED VALIDITY OF POLICY.** — If an insurance company, after knowledge of any default for which it might terminate a contract of insurance, enters into negotiations or transactions with the assured, which recognize the continued validity of the policy, and treat it as still in force, the right to claim a forfeiture for such previous default is waived. *Murray v. Home Ben. L. Ass'n*, 133.
38. **WAIVER — UNCONDITIONAL OFFER TO ACCEPT OVERDUE PREMIUM IS WAIVER OF FORFEITURE WHEN.** — An unconditional offer by an insurance company to accept, at a future time, an overdue premium, with a tender of payment in pursuance of such offer, is a waiver of any forfeiture that might have been enforced because the premium was not paid when due. *Murray v. Home Ben. L. Ass'n*, 133.
39. **WAIVER OF FORFEITURE TREATED AS UNCONDITIONAL WHEN.** — A forfeiture is not favored, and will not be enforced unless specifically and definitely provided for in the contract; and a waiver thereof will be treated as unconditional, unless it clearly appears that it was otherwise understood by the parties. *Murray v. Home Ben. L. Ass'n*, 133.
40. **TENDER MAY BE MADE WITHIN REASONABLE TIME.** — Where an insurance company requests the assured to make overdue payments of premium after a forfeiture has accrued, without any conditions being annexed to the request, a tender of such payment may be made within a reasonable time after such request. And the fact that at the time of the tender the assured was in his last illness, and within a few days of his death, will not render the tender ineffectual, where the offer to receive the assessments contains no conditions that the assured must be in good health at the time of payment. *Murray v. Home Ben. L. Ass'n*, 133.
41. **BENEFIT SOCIETY — INSURED HAS NO INTEREST IN FUND.** — The insured member in a mutual benefit society has no interest in the fund. He simply has a power of appointment, which, if not exercised, becomes inoperative, and in no event does the insurance money become assets of the insured's estate. *Rollins v. McHatton*, 260.
42. **BENEFICIAL ASSOCIATION — BENEFICIARY, WHO MAY BE.** — Under a statute authorizing the organization of corporations for the purpose of assisting the widows, orphans, and other relatives of deceased members, or any persons dependent upon deceased members, one may be made a beneficiary who is neither a widow, orphan, or other relative of the member, if wholly or partly dependent upon him for support. *McCarthy v. Supreme Lodge*, 637.

43. **BENEFICIAL ASSOCIATIONS — DEPENDENTS, WHO ARE NOT.** — A beneficiary must be dependent upon a member in a material degree for support, maintenance, or assistance, and the obligation on the part of the member to furnish it must rest upon some moral, legal, or equitable ground, and not upon the purely voluntary or charitable impulses of the member. *McCarthy v. Supreme Lodge*, 637.
44. **BENEFICIAL ASSOCIATIONS — DEPENDENT, WHO IS.** — ONE ENGAGED TO BE MARRIED TO A MEMBER, to whose support he contributes weekly, under an agreement so to do, a material sum, which is necessary for her comfortable support, is a dependent, within the meaning of the statute controlling beneficial associations, where the contribution is made and accepted on account of the engagement of marriage, and the agreement to make it was induced by her leaving, at his request, an employment in which she was receiving more wages than she could get in the new employment into which she entered. The fact that she could have returned to her old employment, and thereby have supported herself as she had been accustomed to do before leaving, and that since the death of her *fiancée* she had supported herself, cannot affect her *status* at the time of his death and at the time the certificate was taken out. *McCarthy v. Supreme Lodge*, 637.
45. **BENEFICIAL ASSOCIATION — DEPENDENT, CEASING TO BE.** — The *fiancée* of a member on whom she is dependent for support does not cease to be such dependent on account of their having had a lovers' quarrel, and his feelings having become for a time alienated from her, if, up to the time of his death, their engagement had not been broken, and she expected to meet him again, and make up their quarrel, and there is nothing to show that he had intended to contribute no longer to her support, or that she understood that she was not to depend on him any longer. *McCarthy v. Supreme Lodge*, 637.
46. **BENEFIT SOCIETY — CHANGE OF BENEFICIARY.** — The beneficiary named in an insurance certificate issued by a benefit society may be changed by the member, when power to make the change is conferred by the charter and by-laws, and also recognized in the contract of insurance. *Rollins v. McHatton*, 260.
47. **BENEFIT SOCIETY — CHANGE OF BENEFICIARY — EQUITABLE JURISDICTION.** — Where the insured member in a mutual benefit society has in good faith attempted to comply with the mode prescribed for changing his beneficiary, but, owing to circumstances beyond his control, the change is not entirely consummated at the time of his death, equity will sometimes treat the substitution as complete. *Rollins v. McHatton*, 260.
48. **BENEFIT SOCIETY — CHANGE OF BENEFICIARY.** — Where a certificate of membership and insurance issued by a benefit society specifies the mode in which a change of beneficiary may be made, such mode must be strictly followed, to be valid, and when the certificate specifies that such change is to be made by an entry thereof on the records of the society, a mere delivery of the certificate by the assured, accompanied with oral declarations in relation thereto, will not constitute such a compliance as will work a change of beneficiary. *Rollins v. McHatton*, 260.
49. **BENEFICIAL ASSOCIATIONS.** — **CHANGE OF BENEFICIARY** cannot be made by the will of a member when the by-laws of the association point out

- a mode in which such changes can be made, and that mode was not adopted. *McCarthy v. Supreme Lodge*, 637.
50. **BENEFIT SOCIETY — DEATH OF BENEFICIARY BEFORE ASSURED.** — Where the beneficiary named in an insurance certificate issued by a mutual benefit society dies before the insured member, no interest in the fund vests in the beneficiary, and her surviving son inherits no part of the fund by virtue of his relationship. *Rollins v. McHatton*, 260.
51. **BENEFIT SOCIETY — WHEN VESTS IN BENEFICIARY.** — When a certificate of insurance in a mutual benefit society provides that upon the death of the member named therein the insurance shall be paid to his wife, or in case of her death to his children, she has a vested right to the fund upon the death of her husband, and upon her subsequent death the fund vests in her administrator as part of her estate. *Chartrand v. Brace*, 235.
52. **LIFE — PRESCRIPTION DEFINED.** — A judge, being requested by a jury to define the word "prescription," responded as follows: "If the insured went to a physician for the purpose of getting his aid, advice, or assistance as a physician, in a difficulty under which he was then suffering, or supposed himself to be suffering, and the physician, hearing what the insured had to say, as a physician, and for the purpose of relief, or cure, or aid, or assistance, gave to the insured medicine, then it may be said that such a physician prescribed for him." It was held that this response was correct, and was not subject to the objection that it was a charge upon the facts. *Cobb v. Covenant Mut. Ben. Ass'n*, 619.
53. **INSURANCE CERTIFICATE — TIME WITHIN WHICH ACTION MAY BE BROUGHT THEREON.** — Though a clause in a certificate of insurance declares that no action shall be maintained for any cause connected therewith unless such action is commenced within six months after the happening of the death on account of which the action is brought, the limitation does not commence to run until the cause of action has matured so that suit can be maintained thereon. *Matt v. Iowa Mut. Aid Ass'n*, 483.
54. **VENUE, CONTRACT LIMITING.** — **INSURANCE CERTIFICATE LIMITING THE PLACE WHERE ACTION CAN BE BROUGHT** thereon to the county in which the principal office of the insurer is situated, is, as to such limitation, void, and cannot prevent the maintenance of such action in any court of competent jurisdiction. *Matt v. Iowa Mut. Aid Ass'n*, 483.
55. **ACCIDENT INSURANCE — EXCEPTIONS IN POLICY SUSCEPTIBLE OF TWO CONSTRUCTIONS.** — Where an exception to a policy of accident insurance is capable of two meanings, the one is to be adopted which is most favorable to the insured. *Travelers Ins. Co. v. Murray*, 267.
56. **EXCEPTIONS IN POLICY — CONSTRUCTION.** — Where a policy of accident insurance insures against death from bodily injury caused through external, violent, and accidental means, but excepts from liability for death from hernia, or medical or surgical treatment, the insurer is liable when the proximate cause of death is hernia inflicted by external, violent, and accidental means. *Travelers Ins. Co. v. Murray*, 267.
57. **VIOLATION OF SUNDAY LAW AS BAR TO RECOVERY.** — Under an accident insurance policy providing that no recovery can be had for an injury effected or resulting wholly or partly, directly or indirectly, from any violation of law, the insured cannot recover for an injury received on Sunday, and caused by an accident while he was returning from a hunt-

ing expedition, in a state where the statute prohibits both hunting and traveling for pleasure on Sunday. *Duran v. Standard etc. Ins. Co.*, 773.

58. PROXIMATE CAUSE OF DEATH. — Where the insured under an accident policy is injured by an accident producing hernia, and dies after a necessary but unsuccessful surgical operation resulting in peritonitis, the accident, and not the operation, is the proximate cause of death. *Travelers Ins. Co. v. Murray*, 267.
59. EVIDENCE OF VIGOR AND HABITS OF ASSURED. — Where an action to recover on a policy of accident insurance for the death of the insured from hernia, inflicted while performing his duties as a railroad fireman after the policy issued, recovery is resisted on the ground that he was afflicted with chronic hernia long before the accident, evidence showing his habits, health, vigor, and ability to perform continued hard labor up to the time of the injury is competent to refute the defense set up. *Travelers Ins. Co. v. Murray*, 267.
60. EVIDENCE — WHAT REQUIRED TO ESTABLISH PRIOR DISEASE OR INFIRMITY. — Where, in an action to recover on a policy of accident insurance for the death of the insured from hernia, inflicted while he was performing his duties as a railroad fireman after the policy issued, recovery is resisted on the ground that the deceased was afflicted with chronic hernia long before the accident, this defense must be established affirmatively by competent testimony, and it is not established by statements made by the deceased to his physician after the accident, to the effect that he did not know that he had ever been afflicted with hernia, although he had noticed a little lump there at times for about eight years back, especially when the evidence of other witnesses, who knew him intimately and for a long time, shows his continued good health, bodily vigor, and a condition absolutely incompatible with the supposed disability for a long time prior to the accident. *Travelers Ins. Co. v. Murray*, 267.

See MANDAMUS, 6; RAILROAD COMPANIES, 12; VENDOR AND PURCHASER, 15.

INTEREST.

See DAMAGES, 7.

INTOXICATING LIQUORS.

See MASTER AND SERVANT, 6, 7; STATUTES, 13.

INTOXICATION.

See RAILROAD COMPANIES, 6, 7.

JUDGMENT — DECREE.

1. RELIEF FROM, IN EQUITY, WHAT FRAUD JUSTIFIES. — A judgment or decree will not be set aside or annulled in equity on account of any fraud which is not extrinsic or collateral to the questions examined and determined in the original action. A fraud is not extrinsic or collateral, within the meaning of the rule, unless it is one the effect of which prevents a party from having a trial. *Pico v. Cohn*, 159.
2. EQUITY — RELIEF FROM JUDGMENT. — PERJURY, THOUGH INDUCED BY BRIBERY, is not available in equity as a ground for obtaining relief from a judgment procured thereby, when such judgment was the result of the

trial of an action in which the truth of the alleged perjury was necessarily drawn in question and submitted to the court for its determination, and such bribery, though suspected, could not be established in time to be made the ground of a new trial or of other relief on the former action. *Pico v. Cohn*, 159.

3. **EQUITY HAS JURISDICTION TO VACATE SATISFACTION OF JUDGMENT AND ENFORCE LIEN OF LEVY WHEN.** — A court of chancery has jurisdiction to vacate a satisfaction of judgment effected through a void execution sale of lands, and if the levy is valid, to enforce its lien by a sale of the lands. *Ballard v. Scruggs*, 703.
 4. **A COLLATERAL ATTACK ON A JUDGMENT OR ORDER** cannot be successful unless such judgment or order is void. *Dyer v. Leach*, 171.
 5. **CORRECT JUDGMENT AFFIRMED, THOUGH RENDERED ON INSUFFICIENT GROUNDS.** — A judgment, if correct, will be affirmed, although it was rendered upon grounds that were insufficient. *Railway Co. v. Wilson*, 693.
 6. **RESTITUTION AFTER MODIFICATION.** — If a judgment is modified on appeal by reducing the amount of the recovery, the appellant is not entitled to have a sale made of the property to a party to the action, for an amount less than the judgment as modified, vacated, though the statute declares that when a judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order. *Hewitt v. Dean*, 227.
 7. **RES JUDICATA — HOMESTEAD.** — AFTER A JUDGMENT OF FORECLOSURE against a husband, he cannot, in defense of an action by the purchaser under such foreclosure, assert that the property was a homestead when the former judgment was entered; that his wife was not a party to the judgment and was not affected thereby; and that he has a right of possession acquired from the homestead right of his wife. Whatever right the husband had because of the wife's homestead right was available as a defense to the foreclosure suit. *Dodd v. Scott*, 492.
 8. **FORMER JEOPARDY — DISAGREEMENT OF JURY.** — The fact that one accused of a crime is tried before a jury which, in announcing that its members cannot agree, is discharged in his absence, and while he is confined in jail, does not entitle him to be released from custody and further trial on the ground that he has been once in jeopardy. *Yarborough v. Commonwealth*, 524.
 9. **FOREIGN JUDGMENT — PLEADING — RENDITION AND ENTRY OF.** — In an action upon a judgment of the queen's bench division of the high court of justice, in England, an averment in the complaint that the plaintiff in the action in which the judgment was rendered signed final judgment for a specified sum in accordance with the terms of an order of said court, "which said judgment was then and there duly given, made, and entered," is sufficient as against a general demurrer. *Dore v. Thornburgh*, 100.
- See** APPEAL AND ERROR, 5; ATTACHMENT, 3, 4; EVIDENCE, 2; HUSBAND AND WIFE, 10; JUSTICE OF THE PEACE; LIMITATIONS OF ACTIONS, 3; RECEIVING STOLEN GOODS, 6; REPLEVIN, 6.

JUDICIAL SALES.

See EXECUTIONS, 6-9; EXECUTORS AND ADMINISTRATORS.

JURISDICTION.

See PERJURY; TRUSTS, 2

JUSTICE OF THE PEACE.

JUDGMENT OF JUSTICE OF PEACE IRREGULAR, BUT NOT VOID, WHEN. — A judgment rendered by a justice of the peace upon service of summons made by a special officer appointed upon an affidavit, which failed to show that "the business was urgent," is not void, but merely irregular. *Railway Co. v. Brooks*, 673.

LACHES.

See BANKS AND BANKING, 1; PARTNERSHIP, 2

LANDLORD AND TENANT.

1. **LANDLORD ESTOPPED FROM CLAIMING DAMAGES FOR EXPENSE OF IMPROVEMENTS WHEN.** — Where a lease provides that compensation to the landlord for an improvement made by him for the tenant's benefit is to be made solely from the rents reserved, the landlord, by accepting a surrender of the leased premises, is estopped from claiming damages for the expense of the improvement. *Welcome v. Hess*, 145.
2. **LANDLORD ESTOPPED FROM DENYING SURRENDER OF LEASE WHEN.** — A landlord who takes possession of premises abandoned by his tenant before the expiration of the term, and relets them for a period longer than the remainder of the term without notifying the original lessee that he would do so on his account, and without notifying him that he would continue to hold him liable for the rent, will be estopped from denying that he accepted the surrender of the lease. *Welcome v. Hess*, 145.
3. **TENANT CANNOT ABANDON WITHOUT ACCEPTANCE OF SURRENDER BY LANDLORD.** — A tenant cannot abandon his title; and notwithstanding he has gone out, unless the surrender is accepted by the landlord, his right of possession continues during the term. *Welcome v. Hess*, 145.

See LEASE.

LARCENY.

1. **TAKING OF PROPERTY, WHAT SUFFICIENT TO CONSTITUTE.** — Under the code of Texas, the essential element of theft is a fraudulent taking of property, and such taking is sufficiently established by evidence showing that the property, consisting of money, was in a drawer which the accused had unlocked with his own keys and had opened; that his hands were in the drawer when he was discovered; that in response to a command to hand over the money he had taken, he had surrendered some which was in his hands and some out of his pocket, which, together with that remaining in the drawer, made up the full amount which was therein before he unlocked it. *Harris v. State*, 717.
2. **HANDING IMMEDIATELY BACK TO THE OWNER PROPERTY feloniously taken does not purge the offense.** *Harris v. State*, 717.
3. **LARCENY OF PROPERTY OBTAINED BY FRAUD.** — One may be convicted of larceny of property which he obtained from another by fraud, premeditated trick, or device. *Commonwealth v. Lannan*, 629.
4. **LARCENY OF PROPERTY, PART OF WHICH BELONGED TO THE THIEF.** —

One may be convicted of larceny who fraudulently obtained possession of a sum of money, to a small part of which he was entitled, with an intent at the time of misappropriating the whole to his own use. *Commonwealth v. Lannan*, 629.

5. AGENT WHO OBTAINED POSSESSION OF A SUM OF MONEY UPON HIS FALSE REPRESENTATION that it was the amount necessary to be paid for certain land, which his principal desired to buy, and who, after paying the real price asked for the land, appropriated the balance to his own use, is guilty of larceny. *Commonwealth v. Lannan*, 629.
6. THE POSSESSION OF STOLEN PROPERTY almost immediately after the larceny raises a presumption of guilt, which, if not rebutted, will warrant a conviction of the larceny. *Huggins v. People*, 357.
7. EVIDENCE — POSSESSION OF STOLEN PROPERTY AS EVIDENCE OF GUILT. — It is error to instruct a jury that the possession of stolen property is a circumstance sufficient to warrant the presumption of guilt on the part of the person having such possession, if the evidence shows that such possession was recent, personal, exclusive, and unexplained. The instruction upon this subject should be, that such possession is a mere circumstance to be considered by the jury in connection with other evidence in the case in determining the issue of the defendant's guilt. *Cooper v. State*, 712.

See INDICTMENT.

LEASE.

1. STATUTE OF FRAUDS — SURRENDER, WHAT CONSTITUTES, AND HOW MADE. — A surrender is the yielding up of an estate for life or years to the reversioner or remainderman. Under the statute of frauds, it can be made only by express consent of the parties, in writing, or by operation of law when the acts of the parties imply that both have consented, and are such as estop them from disputing the fact of surrender, and as would not be valid unless the term were ended. *Welcome v. Hess*, 145.
2. ACTS IMPLYING CONSENT TO SURRENDER OF LEASE INDEPENDENT OF INTENTION OF PARTIES. — A surrender of a lease by operation of law results from acts which imply mutual consent, independently of the intention of the parties that their acts shall have that effect. It is by way of estoppel. *Welcome v. Hess*, 145.
3. FORMAL SURRENDER OF LEASE UNNECESSARY WHEN. — Where a landlord resumes possession with the acquiescence of the tenant, or gives a lease to another, or does any act which amounts to an eviction, he will be estopped from disputing the surrender, and a formal surrender will be unnecessary. *Welcome v. Hess*, 145.

See LANDLORD AND TENANT.

LEGISLATURE.

- CONSTITUTIONAL LAW — DELEGATION OF LEGISLATIVE POWER. — A statute making the common right of the people of the whole state to take oysters from its waters depend upon the result of the popular vote of persons residing in any number of the election districts of a certain county, as to whether or not the taking of oysters by scoop or dredge within the waters of such county by any person shall be prohibited, is unconstitutional. The legislature cannot delegate its power to a county to

regulate or deny a right common to the people of the whole state.
Bradshaw v. Lankford, 602.

See STATUTES.

LESSOR AND LESSEE.

See LANDLORD AND TENANT; RAILROAD COMPANIES.

LIBEL.

INJUNCTION WILL NOT ISSUE TO RESTRAIN defendant from libeling complainant when the libels complained of are nothing more than false representations as to the character and quality of his property and as to his title thereto. *Covell v. Chadwick*, 625.

See SLANDER.

LIENS.

See JUDGMENT.

LIFE INSURANCE.

See INSURANCE, 20-54.

LIMITATIONS OF ACTIONS.

1. **STATUTE OF LIMITATIONS, RUNNING OF, NOT PRESUMED FROM ALLEGATION IN PLEADING WHEN.** — An allegation in a pleading showing money to have been loaned at a date sufficiently remote to admit of the running of the statute of limitations raises no presumption that the statute has run. But when the allegation is consistent with the opposite conclusion, — that is, that the debt is not barred, — the defense must be raised by plea. *Curtiss v. Aetna Life Ins. Co.*, 114.
2. **FOREIGN JUDGMENTS.** — That portion of the statute of limitations limiting the time within which actions may be commenced "upon a contract, obligation, or liability, not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the state," is not applicable to foreign judgments. *Dore v. Thornburgh*, 100.
3. **STATUTE OF LIMITATIONS OF TEN YEARS BARS ACTION ON JUDGMENT.** — A suit to vacate the satisfaction of a judgment is to be treated as an action on a judgment, so far as any relief is sought by reason of such judgment, and is barred if not commenced within ten years from the date of the original judgment. *Ballard v. Scruggs*, 703.
4. **STATUTE OF LIMITATIONS OF TEN YEARS BARS SUIT TO ENFORCE LIEN OF LEVY.** — A suit to enforce the lien of a levy of execution upon lands is barred by the lapse of ten years from the making of the levy. *Ballard Scruggs*, 703.
5. **TRUSTS.** — **STATUTE OF LIMITATION** will not run against a note given by a husband to his wife as evidence that he holds certain moneys in trust for her as her separate estate at any time prior to his death, and therefore such note constitutes a claim against his estate, though made twenty-three years before his death. *Veal v. Veal*, 534.
6. **CARRIERS.** — **STATUTE OF LIMITATION DOES NOT COMMENCE TO RUN** against an action to recover for unjust discrimination made by a common carrier until the fact of such discrimination is discovered, where it is fraudulently concealed by the carrier. *Cook v. Chicago etc. R'y Co.*, 512.

7. **STATUTE OF LIMITATIONS AGAINST COURT OR RECEIVER.** — Neither a court of equity nor a receiver appointed by it is exempt from the operation of the statute of limitations. *Laidley v. Smith*, 825.
 8. **RECEIVER — PLEADING.** — When the receiver in a suit in equity is directed to lend out money in his hands, and in lending such money takes a promissory note therefor, payable on demand to himself as receiver, the statute of limitations begins to run against the note from the date of its execution; and when, in a suit on the note, the plea of such statute is interposed, to which plaintiff objects, he must, in order to avail himself of any statutory or other exceptions to take the note out of the operation of the statute, state them in a special replication to the plea. *Laidley v. Smith*, 825.
 9. **AN ACTION FOR RELIEF IS, ON THE GROUND OF FRAUD,** within the meaning of the statute of limitations, when it is for an accounting for moneys held and received in trust for the contestant and appropriated to defendant's use, the receipt and existence of which were at all times concealed from the plaintiff. *Lataillade v. Orena*, 219.
 10. **FRAUD.** — A COMPLAINANT IS NOT CHARGEABLE WITH WANT OF DILIGENCE IN NOT DISCOVERING THE FRAUD of his guardian in concealing the receipt and existence of property when such guardian was his stepfather, in whose family, and as whose child, he was brought up, and in whom he had implicit confidence, and there was no reason for him to suspect that a fraud was being practiced upon him. There being nothing to put him on inquiry, he cannot be presumed to have known anything concerning the fraud, nor not to have used due diligence because he did not suspect and detect it. *Lataillade v. Orena*, 219.
 11. **FRAUD.** — Though a statute provides that a cause of action on the ground of fraud shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud, the party relying on such statute must show that he used due diligence to detect the fraud complained of, and should state when he discovered it, how the discovery was made, and why it was not made sooner. *Lataillade v. Orena*, 219.
- See **BANKS AND BANKING**, 2; **HUSBAND AND WIFE**, 13; **INSURANCE**, 20, 24.

LIQUIDATED DAMAGES.

See **DAMAGES**, 5.

LIS PENDENS.

NOTICE. — PURCHASER PENDENTE LITE IS CHARGEABLE WITH NOTICE of the allegations of a bill in equity relating to the subject-matter of the purchase. *Mullanphy Sav. Bank v. Schott*, 401.

LOTTERIES.

1. **AUSTRIAN GOVERNMENT BOND.** — The sale of an Austrian government bond, under which the purchaser receives in any event the face value thereof, with interest up to the time of a drawing, and a premium prize of twenty per cent, with a chance to draw a higher prize from numbers drawn from a wheel at stated times, is the sale of a chance in a lottery, within the meaning of a statute prohibiting the sale of "anything" which, on the happening of an event or contingency in the nature of a lottery, entitles the holder to money or property. *Ballock v. State*, 559.

2. **FOREIGN GOVERNMENT BOND — RIGHT OF STATE TO PROHIBIT SALE OF.** — When a foreign government bond is coupled with conditions and stipulations which change its character from a simple bond for the payment of money of a specified amount to a species of lottery ticket, a state statute prohibiting the sale thereof does not violate treaty stipulations nor constitutional provisions. *Ballock v. State*, 559.
3. **WHAT IS.** — Any device whereby money or any other thing is to be paid or delivered on the happening of any event or contingency in the nature of a lottery is a lottery. *Ballock v. State*, 559.
4. **EFFECT OF, ON NON-RESIDENTS.** — A statute prohibiting the sale of lottery tickets within the state operates equally and alike upon resident and non-resident foreigners, and as to the latter, it does not violate treaty or constitutional provisions. *Ballock v. State*, 559.
5. **PRIZE PACKAGE — GIFT ENTERPRISE.** — A scheme by which packages of coffee contain on either end a pasted slip of paper containing the words "one plate," "one plate," "one saucer," and which, when detached by the buyer of a package of coffee and presented to seller, entitles the former to two plates and a saucer in addition to the coffee, is within the meaning of a statute prohibiting "any scheme or device by way of gift enterprises of any kind or character." *Long v. State*, 606.

MANDAMUS.

1. **MANDAMUS TO REVIEW ACTION OF COURT.** — *Mandamus* will not lie to compel a judge to hear and determine a motion for the restoration of money to a prisoner, who has been deprived of it by an officer at the time of his arrest, when the money has subsequently been attached in the hands of the officer, and the attachment suit remains undecided, and the motion to restore has been overruled, on the ground that the court has no jurisdiction to entertain it. *Ex parte Hurn*, 23.
2. **MANDAMUS PROPER TO COMPEL ELECTION OFFICERS TO DETERMINE TIE VOTE BY LOT.** — Where election officers, after certifying the result of an election to be a tie vote, adjourn without determining by lot the person entitled to the office, they may be compelled by *mandamus* to reassemble and take the action required by law. *Johnston v. State*, 412.
3. **MANDAMUS WILL NOT ISSUE TO A PUBLIC OFFICER, UNLESS** the duty to be enforced by it is the performance of some precise, definite act, or is one of a class of acts purely ministerial and in respect to which the officer has no discretion whatever, and the right of the party applying for it is clear, and he is without other adequate remedy. *American Casualty etc. Ins. Co. v. Fyler*, 337.
4. **MANDAMUS WILL NOT ISSUE TO CONTROL AN EXECUTIVE OFFICER** in discharging an executive duty involving the exercise of discretion or judgment. *American Casualty etc. Ins. Co. v. Fyler*, 337.
5. **MANDAMUS WILL NOT ISSUE TO COMPEL AN EXECUTIVE OFFICER** to perform an act, when the duty of performing it depends on the construction of a statute, and the officer has construed it as not requiring him to perform the act, though the court may be of the opinion that his construction of the statute is incorrect. *American Casualty etc. Ins. Co. v. Fyler*, 337.
6. **MANDAMUS WILL NOT ISSUE TO AN INSURANCE COMMISSIONER** to compel him to admit a foreign insurance company to do business in the state, if he is vested by the statute with a discretion respecting the admission, and has construed the statute as not requiring him to admit such

- company, though the court may not agree with him in his construction of the statute. *American Casualty etc. Ins. Co. v. Fyler*, 337.
7. **DEFINITION. — A MINISTERIAL ACT** is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done. *American Casualty etc. Ins. Co. v. Fyler*, 337.
8. **MANDAMUS. — AN ALTERNATIVE WRIT OF MANDAMUS MUST SHOW UPON ITS FACE** a clear right to the relief demanded, and the material facts upon which the applicant relies must be distinctly set forth, so that they can be admitted or denied; otherwise the writ may be quashed. *American Casualty etc. Ins. Co. v. Fyler*, 337.

See **INJUNCTION**, 2; **PLEADING**, 3.

MARRIAGE AND DIVORCE.

ALIMONY IS AN ALLOWANCE MADE TO A WOMAN on a decree of divorce for her support out of the estate of her husband, and under exceptional circumstances it may be decreed, once for all, of a sum in gross, or of real estate absolutely, to the wife, and at all events alimony terminates with the life of the husband. *Adams v. Storey*, 392.

MARRIED WOMEN.

See **HUSBAND AND WIFE**.

MASTER AND SERVANT.

1. **MASTER BOUND TO INSTRUCT INEXPERIENCED SERVANT IN REFERENCE TO DANGEROUS MACHINERY. —** A master who puts to work upon a dangerous machine a servant known to be without experience in the particular work, and without knowledge of the actual dangers attending it, is bound to give him such instructions as will enable him to fully understand and appreciate the danger attending the work and the necessity for care. *Ingerman v. Moore*, 138.
2. **SERVANT OF MATURE YEARS, WHEN ENTITLED TO INSTRUCTIONS CONCERNING DANGEROUS MACHINERY. —** While the rule which requires an employer to give proper instructions to his servant in reference to dangerous machinery is most frequently applied in cases where persons of immature years are employed about dangerous machinery, the same principle governs where the person so put to work is of mature years, but without experience in the particular work, and without knowledge of the actual dangers attending it. But the fact that the person injured is of mature years is a matter for the careful consideration of the jury in determining whether he fully understood and appreciated the dangers of his position. *Ingerman v. Moore*, 138.
3. **JURY TRIAL — WHETHER SERVANT EXPERIENCED IN WORK QUESTION FOR JURY WHEN. —** Where it appears that an employee in a saw-mill was injured while running a scantling-machine and saw, in attempting to remove slivers from under the saw, by reason of his sleeve catching on a concealed set-screw fixed upon and projecting from a shaft located below the saw, the fact that he had been employed in the mill for nearly two years, and had been working as an assistant on the scantling-machine, in putting the lumber in place to be sawed, for about nine months, and had, in the absence of the foreman, upon different occa-

sions, run the machine for eighteen days in all, does not warrant the court in declaring as matter of law that he was experienced in the work he was doing, and had knowledge of the set-screw and of the danger of placing his hand where he did while the machine was running, but his experience and knowledge of the machine are questions of fact for the jury. *Ingerman v. Moore*, 138.

4. **EMPLOYER LIABLE FOR NEGLIGENCE OF 'HIS SUPERINTENDENT.** — The fact that the owner of a saw-mill did not manage the mill in person, and did not personally employ or have communication with a servant injured while at work upon dangerous machinery, does not absolve him from liability for the negligence of his superintendent or foreman in putting the servant to work without proper instructions. *Ingerman v. Moore*, 138.
5. **FELLOW-SERVANTS.** — All who are servants of a common master, engaged in the same general business, subject to the same general control, and paid out of a common fund, are fellow-servants, without regard to rank or grade, and whether the element of personal control enters into the consideration or not, in respect to all acts done in the common service, unless the duty performed by them is such as properly belongs to the master as such, in which case they take the place of the master, and he is chargeable with their acts as if done by him personally, with all the knowledge which the law imputes to him. *Georgia Pacific R'y Co. v. Davis*, 47.
6. **MASTER IS NOT ORDINARILY RESPONSIBLE CRIMINALLY** for the act of his servant or agent, unless he has in some way participated, or countenanced or approved it. *Commonwealth v. Stevens*, 647.
7. **MASTER IS NOT CRIMINALLY RESPONSIBLE** for the sale, by his servant, of liquor to a minor, if he had instructed all of his servants not to make any sales to minors, nor to persons under twenty-five years of age, but had left his servants to determine the question of minority from the appearance of customers applying for liquors, and one of his clerks had made an innocent mistake in judging of a customer's appearance. It cannot be affirmed as a matter of law that the test of appearance is unreasonable. Whether it was or not, and whether its imposition indicated bad faith or negligence, the jury should be left to determine. *Commonwealth v. Stevens*, 647.

See RAILROAD COMPANIES; STATUTES, 11, 12.

MAXIMS.

Sic utere tuo ut alienum non ledas. *Barrett v. Southern Pac. Co.*, 186.

MECHANICS' LIENS.

See CONTRACTS, 10.

MERGER.

See MORTGAGES.

MILLS AND MILL-DAMS.

See EASEMENTS, 2; WATERCOURSES.

MISTAKE.

MISTAKE OF LAW, RECOVERY OF MONEYS PAID UNDER. — Fees paid by a county to a public officer, under a mistaken belief on his part and that
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of the county that he was entitled to them by law, cannot be recovered by the county, for the reason that its mistake was one of law, on account of which no recovery can be had. *Painter v. Polk County*, 489.

MODIFICATION.

See JUDGMENTS, 6.

MORTGAGES.

1. **FORECLOSURE OF JUNIOR MORTGAGE AS RES JUDICATA.** — One holding a senior mortgage, the superiority of which is not drawn in question by a bill to foreclose a junior mortgage, is not divested of his prior right by the ordinary decree of foreclosure against him therein, nor will his superior right be placed in issue by making him a party to such bill, and alleging therein that he claims title to the premises by deed or otherwise. *Buzzell v. Still*, 777.
 2. **MERGER.** — Where first, second, and third mortgages exist against the same property, and the third mortgage is by deed absolute on its face, an assignment of the first mortgage to the third mortgagee will not merge the first and third mortgages. *Buzzell v. Still*, 777.
- See CHATTEL MORTGAGE; CORPORATIONS, 7, 8; COVENANTS, 3, 4; INSANE PERSONS; POWERS.

MUNICIPAL CORPORATIONS.

1. **OFFICE AND OFFICERS — REMOVAL OF MUNICIPAL OFFICER, WHEN DISCRETIONARY.** — When the tenure of a municipal office is at the pleasure of the appointing body, its power to remove is discretionary, and may be exercised without notice or hearing. *Carter v. City of Durango*, 294.
2. **OFFICE AND OFFICERS — AUTHORITY OF CITY COUNCIL TO REMOVE OFFICER IS QUASI JUDICIAL.** — The city council is primarily a legislative and administrative body, but it may be clothed with *quasi* judicial authority in connection with removals from municipal offices. *Carter v. City of Durango*, 294.
3. **OFFICE AND OFFICERS — POWER OF CITY COUNCIL TO REMOVE OFFICER.** — The possession or exercise of judicial power by the city council is not a prerequisite to its authority to remove all its officers. The possession of such power is only necessary in cases of removal from offices which are of the essence of the corporation, and which can only take place for cause, upon notice and investigation with opportunity to be heard. Its possession by the council is not necessary in cases of removal from office to which the occupant is appointed at the pleasure of the council. *Carter v. City of Durango*, 294.
4. **OFFICE AND OFFICERS — REMOVAL OF MUNICIPAL OFFICER. — THE MOTIVES ACTUATING** city councilmen in removing an officer from an office, the tenure of which is at its pleasure, are not ordinarily subject to judicial inquiry, and in the absence of fraud or deception, courts will not interfere with the declaration of discretionary municipal pleasure by the council. *Carter v. City of Durango*, 294.
5. **OFFICE AND OFFICERS — POWER OF CITY COUNCIL TO REMOVE FROM OFFICE CANNOT BE CURTAILED BY ORDINANCE.** — It is not within the power of a municipal corporation, by ordinance or by-law, either to extend or restrict the discretionary authority conferred on the city council by statute in the matter of the removal of municipal officers. *Carter v. City of Durango*, 294.

6. NOTICE TO AGENT OF CITY AS NOTICE TO CITY. — The rule that notice to the agent of a party, whose duty it is, as such agent, to act upon such notice, or to communicate it to his principal in the proper discharge of his trust as agent, is legal notice to his principal, applies as well to the agents of corporations, both municipal and private, as to those of private persons. *Burditt v. Porter*, 763.
7. MUNICIPAL CORPORATION IS NOT ANSWERABLE FOR THE NEGLIGENT ACT OF ITS SERVANT while engaged in excavating for the foundation of a school-house, though such negligence caused an injury to a person on an adjacent highway not within the limits of the school-house lot. *Howard v. City of Worcester*, 651.
8. MUNICIPAL CORPORATION IS NOT ANSWERABLE FOR THE NEGLIGENCE OF ITS SERVANTS while they are engaged in a work purely for the benefit of the public. *Howard v. City of Worcester*, 651.
9. LIABILITY OF, FOR NEGLIGENCE OR TORT. — Municipal corporations proper, such as villages, towns, and cities, incorporated by special charters or voluntarily organized under general laws, are liable to individuals injured by their negligent or tortious conduct, or that of their agents, in respect to corporate duties; but in regard to public involuntary quasi corporations, such as counties, townships, school or road districts, or the like, the rule is otherwise, and they are not so liable, unless made so by statute. *Elmore v. Drainage Commissioners*, 363.
10. MUNICIPAL CORPORATION IS LIABLE TO AN ACTION FOR DAMAGES resulting from the negligent or improper construction or maintenance by it of a dam or reservoir which it was authorized by statute to make and maintain. The rule is otherwise when due and reasonable precautions are taken, and nothing is done wantonly or negligently, so as to cause unnecessary damages. *Aldworth v. City of Lynn*, 608.
11. DUTY IN CONSTRUCTING BRIDGES. — A city, in the construction of bridges across its streets, is required to provide against such casualties liable to occur from overflow as a cautious and prudent man should foresee and anticipate. *Bradford v. Mayor of Anniston*, 60.
12. LIABILITY FOR DEFECT IN STREET. — The owner of an animal injured while being driven along the public street by stepping into a hole therein caused by rain may, if free from negligence, recover from the city, when it appears that the defect was known thereto, and had existed so long that it might have been repaired in the exercise of reasonable diligence, and that it failed to do this, or to give any notice or warning to the public. In such case, the fact that the street force was busy in repairing other damage done by the rain will not excuse the liability, in the absence of proof that by reasonable diligence an extra force could not have been employed by the city for such emergency. *Bradford v. Mayor of Anniston*, 60.
13. NOTICE to a street overseer of a defect in the street is notice to the city. *Bradford v. Mayor of Anniston*, 60.
14. MUNICIPAL CORPORATION, RIGHT OF TAX-PAYER TO RECOVER FOR DESTRUCTION OF HIS PROPERTY BY FIRE, THROUGH FAILURE OF CONTRACTOR TO FURNISH WATER. — If a water company enters into a contract with a municipal corporation, whereby the former agrees, in consideration of the grant of a franchise and of a promise to pay certain specified prices for the use of hydrants, to construct water-works of a specified character, force, and capacity, and to keep a supply of water required for domestic, manufacturing, and fire protection pur-

poses for all the inhabitants and property of the city, a tax-payer of the city may recover of the water company when, through a breach of its contract, he is left without means of extinguishing fire, and his property is on that account destroyed. *Paducah Lumber Co. v. Paducah Water etc. Co.*, 536.

15. **MUNICIPAL ORDINANCE IN CONFLICT WITH GENERAL LAW OF STATE IS NULLITY.** — A municipal ordinance which conflicts with the general law of the state is a nullity and of no authority. And where a general state law requires railroad companies to blow a whistle when a person or animal appears on the road, such companies are not excused from the performance of this statutory duty within the boundary of a municipality whose ordinance makes the blowing of such whistle a misdemeanor. *Katzenberger v. Lawo*, 681.

See **ASSIGNMENT, 2; DAMAGES, 2-4; RAILROAD COMPANIES, 32-34.**

MURDER.

See **HOMICIDE; INSURANCE, 28.**

MUTUAL BENEFIT SOCIETIES.

See **INSURANCE, 20-54.**

NEGLIGENCE.

1. **NEGLIGENCE, IN A LEGAL SENSE,** is no more than the failure to observe, for the protection of another person, that degree of care, precaution, and vigilance which the circumstances demand, whereby such other person suffers injury. *Barrett v. Southern Pacific Co.*, 186.
2. **IT IS THE DUTY OF EVERY PERSON TO SO USE AND ENJOY HIS PROPERTY AS TO INTERFERE WITH THE COMFORT AND SAFETY OF OTHERS** as little as possible, consistent with its proper use; and a failure to observe this duty in respect to those who have the right to invoke its protection is negligence. *Barrett v. Southern Pacific Co.*, 186.
3. **NEGLIGENCE MUST BE RESPECTING A DUTY TO PLAINTIFF.** — To justify recovery for alleged negligence, it is not sufficient to show that defendant has neglected some duty or obligation existing at common law or imposed by statute. He must be shown to have neglected a duty or obligation which he owed to him who claims damages for the neglect. *Williams v. Chicago etc. R. R. Co.*, 397.
4. **NEGLIGENCE IS NOT PRESUMED AGAINST THE OWNER OR DRIVER OF A HORSE** from the fact that the horse, attached to a cart, ran away while in charge of the driver, and, notwithstanding his efforts to control him, ran over and injured a person in the street. *O'Brien v. Miller*, 320.
5. **CHILDREN.** — **TO LEAVE UNGUARDED, AND EXPOSED TO THE OBSERVATION OF LITTLE CHILDREN,** dangerous and attractive machinery, which they naturally would be tempted to go about and upon, and against the dangers of which their immature judgment opposes no warning or defense, is an act of negligence. *Barrett v. Southern Pacific Co.*, 186.
6. **NEGLIGENCE IN LEAVING A TURN-TABLE UNGUARDED.** — If a turn-table, provided with a latch and slot such as are in common use, is not protected by any inclosure, nor left in the charge of any person whose duty it is to guard it, and a child of eight years of age goes upon it to ride while it is being turned by older children, and is caught and seriously injured, it is for the jury to determine whether the owner of the

- turn-table is guilty of negligence, and answerable to the child for the injuries suffered. *Barrett v. Southern Pacific Co.*, 186.
7. **TURN-TABLES.** — The liability of one who has left a turn-table unguarded and unprotected, for injuries suffered by a child of immature years, is not affected by the fact that the turn-table was set in motion by the negligence of older children. *Barrett v. Southern Pacific Co.*, 186.
 8. **A CHILD OF IMMATURE YEARS HAS CAPACITY TO EXERCISE ONLY SUCH CARE AND SELF-RESTRAINT** as belongs to childhood, and a reasonable man must be presumed to know this, and required to govern his actions accordingly. *Barrett v. Southern Pacific Co.*, 186.
 9. **NEGLIGENCE OF DRIVER OF WAGON NOT IMPUTABLE TO PERSON RIDING WITH HIM.** — The negligence of the driver of a wagon and team which collides with a railway train does not necessarily preclude a recovery by a person riding in the wagon with such negligent driver; but such person cannot recover in such a case unless it affirmatively appears that his own negligence did not proximately contribute to his injury. — *Miller v. Louisville etc. R'y Co.*, 416.
 10. **FAILURE OF PERSON RIDING WITH DRIVER OF WAGON TO LOOK AND LISTEN FOR TRAIN AT CROSSING CONTRIBUTORY NEGLIGENCE.** — Where a wife is riding in a wagon with her husband, who is driving, at a railway crossing known to her to be dangerous, it is her duty to look and listen for approaching trains, and if, while a train is approaching in full view, she takes no precautions to warn him or to avert the threatened danger, she is guilty of contributory negligence, and no recovery can be had for injuries received by her. *Miller v. Louisville etc. R'y Co.*, 416.
 11. **CONTRIBUTORY NEGLIGENCE OF PARENT.** — Where a child of immature years has suffered injuries from an unguarded turn-table, and it is claimed that the negligence of his mother in not properly watching over and caring for him contributed to his injuries, it is not error to charge the jury "that they may consider the evidence as to her condition and circumstances in determining the question as to her negligence." *Barrett v. Southern Pacific Co.*, 186.
 12. **CONTRIBUTORY NEGLIGENCE QUESTION OF FACT WHEN.** — Where an employee is injured by attempting to remove slivers from under a saw without stopping the machinery, the fact that he did not stop the machinery before attempting to remove the slivers does not, of itself, constitute contributory negligence, but it is a question for the jury to determine whether he was exercising due care in what he did. And the jury may take into consideration the facts, that he had often seen such obstructions removed from near the same place when the saw was in motion, and had not been notified that it was dangerous to do so; that to have stopped the machinery to remove the slivers would have occasioned delay in the work; and that it was not the custom to do so. *Ingerman v. Moore*, 138.
 13. **CONTRIBUTORY NEGLIGENCE.** — **BURDEN TO PROVE** contributory negligence is in all cases upon the defendant, although plaintiff's evidence sometimes relieves from the necessity of discharging it. *Georgia Pacific R'y Co. v. Davis*, 47.

See CARRIERS; CORPORATIONS, 11; MASTER AND SERVANT, 4; MUNICIPAL CORPORATIONS, 7-12; RAILROAD COMPANIES.

NEGOTIABLE INSTRUMENTS.

See BILLS AND NOTES.

NEW TRIAL.

CRIMINAL LAW. — A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE should be granted, when the accused has been convicted of rape, and the newly discovered evidence is such as might have led the jury to doubt whether the crime could have been committed as stated by the prosecutrix. *Lincecum v. State*, 727.

NIGHT-WALKING.

See **CRIMINAL LAW**, 4.

NONSUIT.

See **TRIAL**, 1, 2.

NOTICE.

See **AGENCY**, 3; **ASSIGNMENT**, 2; **CORPORATIONS**, 4, 5; **INSURANCE**, 11; **LIS PENDENS**; **MUNICIPAL CORPORATIONS**, 6, 13; **PRIVATE WAYS**, 3; **RAILROAD COMPANIES**, 3.

NUISANCE.

1. **WHAT CONSTITUTES, QUESTION OF LAW.**—In actions to abate nuisances, the question whether the place where the trade or business complained of is carried on is a proper and convenient one for the purpose or not, or whether the use by the defendant of his own land is, under all the circumstances, a reasonable use or not, ought to be determined by the court, and not submitted to the jury. *Susquehanna Fertilizer Co. v. Malone*, 595.
2. **WATERCOURSES — FLOATABLE STREAMS.** — **THE MAINTENANCE OF A DAM** across a floatable stream, so as to prejudice the right of the public to float logs therein, and without providing suitable sluices to allow the logs to pass around the dam, is a public nuisance. *Gaston v. Mace*, 848.
3. **TRADE OR BUSINESS** carried on in such manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, is a wrong done to the adjoining or neighboring owner, for which an action for nuisance will lie, without regard to the locality where the business is carried on, though it may be lawful, and useful to the public, and managed and conducted with the best and most approved appliances and methods. *Susquehanna Fertilizer Co. v. Malone*, 595.
4. **CONVENIENT PLACE — REASONABLE USE.** — **At no place can a nuisance** be maintained on the ground that it is convenient for the carrying on of the business, if such business causes substantial injury to the property of another; nor can any use of one's land be said to be a reasonable use which deprives an adjoining owner of the lawful use and enjoyment of his property. *Susquehanna Fertilizer Co. v. Malone*, 595.
5. **EVIDENCE OF THE CONDITION OF LAND BEFORE IT WAS AFFECTED BY THE NUISANCE** complained of is admissible for the purpose of enabling the jury to determine whether, and to what extent, it has been affected by such nuisance. *Aldworth v. City of Lynn*, 608.
6. **FERTILIZER FACTORY — ADMISSIBILITY OF EVIDENCE IN DEFENSE.** — Where a fertilizer factory is complained of as a nuisance by an owner of adjoining land, evidence of the loss or injury which the owners of other fertilizer factories in the neighborhood might sustain if such business is

held to constitute a nuisance, or of the amount invested in such factories, is inadmissible in defense. *Susquehanna Fertilizer Co. v. Malone*, 595.

7. **DEFENSE THAT PLAINTIFF CAME TO IT.**—Where a fertilizer factory is complained of as a nuisance by an adjoining land-owner, the fact that he came to the nuisance is no defense, in the absence of a claim of prescriptive right by defendant. *Susquehanna Fertilizer Co. v. Malone*, 595.
8. **FERTILIZER FACTORY — COMPARATIVE LOSS NO DEFENSE.** — Where a fertilizer factory is complained of as a nuisance by an adjoining land-owner, no effort will be made to balance the inconveniences, or to estimate the difference between the injury sustained by the plaintiff, and the money invested and loss that may result to the defendant from having its business as carried on found to be a nuisance. The neighboring owner is entitled to the reasonable and comfortable enjoyment of his property, and if his rights in this respect are invaded, he is entitled to protection, let the consequences be what they may. *Susquehanna Fertilizer Co. v. Malone*, 595.
9. **PERMANENT.** — **DAMAGES WILL BE ALLOWED ONLY TO THE COMMENCEMENT OF THE ACTION** for injury sustained by plaintiff from the maintenance of a dam and reservoir by the defendant, from which water percolated, saturating plaintiff's land, though such dam and reservoir were constructed for permanent use, if the court cannot see that the defendant may not reconstruct them in such a way as to prevent the continuance of the percolation with much less expenditure than would be required to pay for a permanent injury to the plaintiff's land. *Aldworth v. City of Lynn*, 608.
10. **DAMAGES FOR, UP TO WHAT TIME SHOULD BE ESTIMATED.** — In an action for polluting a spring by suffering coal-oil to percolate into an underground stream from which the spring was fed, the damage recoverable is that which resulted from the deprivation of the use of the water for domestic or fire purposes up to the time of the trial only, where it is in the power of the defendant to prevent the continuance of the injury. *Kinnaird v. Standard Oil Co.*, 545.
11. **PARTY LIABLE ONLY FOR SUCH, AS RESULTS FROM HIS OWN ACT.** — A nuisance, to be indictable, must be the natural and direct cause of the act of the party charged with maintaining it. It is therefore error, upon the trial of an indictment for maintaining a nuisance in keeping a hog-pen in a filthy condition, for the court to charge that "if the jury find that the smell created by the defendant's pen was not sufficient within itself to constitute a nuisance, yet it contributed, with other pens in the neighborhood, to forming a nuisance, the defendant would be guilty." *Gay v. State*, 707.
12. **LIABILITY FOR, BY ONE HAVING NO NOTICE OF THE RESULTING INJURY.** — One who, on his land, maintains a warehouse for the storage of coal-oil, and permits it to leak from casks and penetrate the ground and contaminate an underground stream of water, from which a spring on the land of an adjacent proprietor is fed, is answerable for the damages thus occasioned, though he did not know of the injury which the percolation of the oil was doing to the spring. *Kinnaird v. Standard Oil Co.*, 545.

OFFICE AND OFFICERS.

See **ARREST**; **ATTACHMENT**, 2; **CORPORATIONS**; **INJUNCTION**; **MANDAMUS**; **MUNICIPAL CORPORATIONS**; **REPLEVIN**, 3, 4.

ORDINANCES.

See MUNICIPAL CORPORATIONS, 15; RAILROAD COMPANIES, 32.

PARENT AND CHILD.

AGREEMENT TO MAKE CHILD HEIR, EFFECT OF. — Where a husband and wife, without children of their own, agreed to take a young child, provide for and bring her up as their own, and at their death leave her all their property, and the husband, with his wife's assent, afterwards adopted the child, it was held, — 1. That the husband was not precluded by the contract from the perfectly free and unrestrained enjoyment of his property, and that he could dispose of it as he pleased, at any time during his life, by gift or otherwise; 2. That a conveyance in good faith, during his lifetime, of all his property to his wife vested in her an absolute title free from any trust in favor of the child; 3. That the contract was void as to the wife, and incapable of subsequent ratification by her because of her coverture at the time it was entered into; 4. That a new verbal contract, made by the wife after her husband's death, was within the statute of frauds, and that a part performance by the child did not take it out of the statute. *Austin v. Davis*, 456.

PAROL EVIDENCE.

See ELECTIONS, 7; EVIDENCE, 7; INSURANCE, 18; RAILROAD COMPANIES, 34.

PARTIES.

NON-JOINDER OF PARTY NOT AVAILABLE WHEN. — Where one of the parties to a trust deed, who is made a party defendant in an action to appoint a new trustee, transfers all his interest in the land to a third person, after the execution of the deed, and after the commencement of the action, he is not in a position to complain that such third person was not made a party to the action, if he did not ask to have him so joined. *Smith v. Davis*, 92.

See CONTRACTS, 6.

PARTITION.

- 1. CO-OWNERS, POWER OF COURT TO ORDER SALE OF PROPERTY OF.** — Under the statutes of Connecticut, courts of equitable jurisdiction have the power to order a sale of property owned by two or more persons jointly or in common when, in the opinion of the court, the sale will better promote the interests of the owners; but no person is entitled to the benefit of this statute who is not interested in the property as an owner. Hence the court is not, by this statute, authorized to direct its sale to pay debts. *Vail v. Hammond*, 330.
- 2. PARTITION OF PROPERTY NOT SUSCEPTIBLE OF DIVISION.** — When partition in kind cannot be conveniently made, the court may either allot the entire subject-matter to the tenant offering the largest sum for the whole, or may order the sale of the whole, and a distribution of the proceeds among the tenants. The court cannot, however, allot the whole to a tenant who is able, but unwilling, to pay to the other tenants as much or more proportionally for their interests as they are willing and able to pay him for his interest; nor can it compel one tenant to accept for his interest less than he is willing and able to pay for the like interests of the other tenants. *Corrothers v. Jolliffe*, 836.

See PRIVATE WAYS, 2.

PARTNERSHIP.

1. **IMPLIED POWER OF PARTNER TO BIND FIRM.** — A partnership formed for taking and executing paving and curb contracts in a city is not a commercial partnership, and the individual members thereof have no implied authority to borrow money and make notes therefor to bind the firm, in the absence of proof showing actual necessity or usage for the exercise of such power in conducting the business. *Harris v. Mayor etc. of Baltimore*, 565.
2. **ACCOUNTING — LACHES.** — A partner who, after the dissolution of the firm, has acquiesced for several years in what was supposed by the partners at the time to be a full settlement of the partnership affairs, will be refused an accounting in equity as against representatives of his partner, since deceased, on the ground that his claim is stale, although it is not barred by limitation, in the absence of a showing why an accounting was not asked during the lifetime of the deceased partner, or for the delay in bringing suit. *King v. White*, 752.
3. **ACCOUNTING — LIABILITY OF DECEASED PARTNER'S ESTATE.** — The estate of a deceased partner is liable for the proceeds of firm property left in his hands and disposed of by him after a dissolution and partial settlement of the partnership. *King v. White*, 752.
4. **ACCOUNTING.** — **SURVIVING PARTNERS MAY MAINTAIN** a bill for an accounting against the estate of their deceased partner, although their claim has been disallowed by the probate court. *King v. White*, 752.
5. **REAL ESTATE PARTNERSHIP — SPECIFIC PERFORMANCE OF CONTRACT FOR SALE.** — One member of a partnership, engaged in the business of buying and selling real estate, can bind the firm by a contract in the firm name for the sale of partnership land, and such contract will be specifically enforced against all the partners. *Rovelsky v. Brown*, 83.
6. **PARTNERSHIP REAL ESTATE** is in equity, and for partnership purposes, to be treated as personalty. *Rovelsky v. Brown*, 83.

PATENTS.

See **CREDITORS' SUITS; FRAUDULENT CONVEYANCES**, 1-5.

PAYMENT.

VOLUNTARY, WHAT IS NOT. — Payment by a shipper to a common carrier of a sum in excess of what it was charging his competitors in the same business cannot be regarded as being voluntarily made by him, when he was without knowledge that the exaction was not lawful, and was in belief of the truth of the assertions of the agents of the carrier, that the rate paid by him was the same as that charged to all other shippers. *Cook v. Chicago etc. R'y Co.*, 512.

See **AGENCY**, 4; **CARRIERS**, 2; **DEBTOR AND CREDITOR**, 1; **MISTAKE**.

PENSIONS.

See **EXECUTION**, 15.

PERJURY.

JURISDICTION — STATE COURTS HAVE, OVER OFFENSE COMMITTED IN FEDERAL CUSTOM-HOUSE, WHEN. — The state courts have jurisdiction of the crime of perjury committed upon the trial of a cause in a state court holding its session in a United States custom-house, situated within the limits of a county town, by express permission of the federal authori-

ties, and under a state law authorizing the judge to hold its sessions at any place within the limits of the county town, if he should deem it impracticable or inconvenient to hold them at the court-house. *Exum v. State*, 700.

See JUDGMENTS, 2.

PERSONAL PROPERTY.

See EXECUTORS AND ADMINISTRATORS, 1; PARTNERSHIP, 6.

PHOTOGRAPHS.

See EVIDENCE, 4.

PHYSICIANS AND SURGEONS.

1. **PLAINTIFF MAY WAIVE TORT AND SUE ON CONTRACT IN ACTION AGAINST PHYSICIAN FOR MALPRACTICE.** — In an action against a physician for malpractice, the plaintiff may waive the tort and sue upon contract. *Lane v. Boicourt*, 442.
2. **COMPLAINT IN CONTRACT NOT IN TORT WHEN.** — A complaint in an action against a physician for malpractice, in which the plaintiff alleges that he employed the defendant to give professional attention to his wife in child-birth, promising him compensation; that the defendant contracted with the plaintiff to render the required services; and that, as a breach of said contract, the defendant failed to give the plaintiff's wife the proper attention, — is a complaint in contract, and not in tort. *Lane v. Boicourt*, 442.
3. **EVIDENCE — PHYSICIAN RELIEVED FROM OBLIGATION OF SECRECY AS TO OCCURRENCE IN SICK-ROOM WHEN.** — Where, in an action against a physician for malpractice, the plaintiff testifies to an occurrence in the sick-room, the physician himself, or one present as a consulting physician, may testify as to the occurrence. The plaintiff, by opening the matter to investigation, removes the obligation of secrecy on the defendant's part. *Lane v. Boicourt*, 442.

PLEADING.

1. **MATTERS OF SUBSTANCE IN PLEADING MUST BE ALLEGED IN DIRECT TERMS.** — Matters of substance constituting an essential element to a cause of action must be alleged in direct terms, and not by way of recital or reference, much less by exhibits merely attached to the pleading. *Burkett v. Griffith*, 151.
2. **JOINDER OF CAUSES OF ACTION.** — A bill in equity against the former guardian of the complainant, to compel an accounting for moneys received at different times from the sale of different parcels of property, states but a single cause of action. *Lataillade v. Orena*, 219.
3. **MANDAMUS.** — OBJECTIONS TO A WRIT OF MANDAMUS, whether of form or of substance, may be taken by a motion to quash. *American Casualty etc. Ins. Co. v. Fyler*, 337.
4. **ANSWER, THOUGH DEFECTIVE, SUFFICIENT TO DEFEAT MOTION TO STRIKE OUT AND FOR JUDGMENT ON PLEADINGS WHEN.** — In an action to recover damages for the breach of a contract, where the defendant, in his answer, evidently intends to claim as a defense that such contract formed part of a scheme or plan of the plaintiff to establish a monopoly and prevent competition in the sale of grain-bags throughout the state, this defense is sufficient to defeat a motion to strike out the answer and

for judgment on the pleadings, although the answer is defectively stated, and would not have been allowed to stand if attacked by demurrer for failing to state with certainty that the contract was entered into as a part of and in pursuance of such scheme or plan. *Pacific Factor Co. v. Adler*, 102.

See COURTS; EVIDENCE, 1; FRAUD; INSURANCE, 17; JUDGMENT, 9; LIMITATIONS OF ACTIONS, 1, 9; PHYSICIANS AND SURGEONS, 2; RAILROAD COMPANIES, 17; SLANDER, 8-10.

POLICE POWER.

See STATUTES.

POWERS.

1. CONVEYANCE—POWER TO DEED, WHEN INCLUDES POWER TO MORTGAGE. — If a will vests the testator's wife with a life estate in his property, with power to sell or convey the same by deed, and to use the proceeds for her comfort, or otherwise, as she may think proper, she has power to mortgage. *Kent v. Morrison*, 616.
2. POWER OF APPOINTMENT BY WILL—HOW MUST BE EXECUTED. — If a deed vests a person with a power of appointment to be exercised by will, the form and mode of appointment must be observed, and a will made in attempted execution of the power must be so executed that it would pass the property, had it belonged to the testator absolutely. *Thrasher v. Ballard*, 894.

PRESCRIPTION.

See EASEMENTS.

PRESUMPTION.

See CO-TENANCY, 1; INSURANCE, 28; NEGLIGENCE, 4; SLANDER, 5.

PRIVATE WAYS.

1. WAY OF NECESSITY, GRANTEE OF LAND ENTITLED TO, WHEN. — Where the owner of a tract of land conveys to another a part thereof lying neither on the public highway nor on the grantee's other land, the deed, by presumption of law, carries with it to the grantee a right of way over the unconveyed part; and such grantee is entitled to such way of necessity without showing that he is unable to obtain a way to the highway over the lands of others. *Ellis v. Bassett*, 421.
2. WAY OF NECESSITY IN CASE OF PARTITION AMONG HEIRS. — A partition of real estate among heirs carries with it, by implication, the same right of way from one part to and over the other as had been plainly and obviously enjoyed by the common ancestor, in so far as it is reasonably necessary for the enjoyment of each part. *Ellis v. Bassett*, 421.
3. NECESSARY SERVITUDE CONTINUED AFTER SEVERANCE OF OWNERSHIP. — Where the owner of an estate imposes upon one part an apparent and obvious servitude in favor of another, and at the time of the severance of ownership such servitude is in use, and is reasonably necessary for the fair enjoyment of the other, then, whether the severance is by voluntary alienation or by judicial proceedings, the use is continued by operation of law. *Ellis v. Bassett*, 421.

- 4. NOTICE OF EXISTENCE OF WAY OF NECESSITY, WHAT SUFFICIENT. —**
Where a way is a way of necessity, is open and visible, and has been used continuously for many years, these facts constitute sufficient notice to a purchaser of the existence of the easement. *Ellis v. Bassett*, 421.

PROCESS.

See REPLEVIN, 1; WITNESSES, 1.

PROXIMATE CAUSE.

See INSURANCE, 58.

PRINCIPAL AND AGENT.

See AGENCY.

PUBLIC LANDS.

AGREEMENT TO CONVEY LAND WHEN TITLE THERETO SHALL BE ACQUIRED UNDER THE HOMESTEAD LAWS of the United States is valid and enforceable if, at the time it was made, the parties thereto were in possession of different parts of a tract, and each entitled to acquire it under such laws, and the object of the agreement was to avoid difficulty, and enable each to acquire title to the portion of which he was already in possession, and the right to the possession, of which the other conceded. *Sweesey v. Sparling*, 506.

PUBLIC POLICY.

See CARRIERS, 5; CONTRACTS, 9.

QUASI CORPORATIONS.

See DRAINS.

QUESTIONS OF FACT.

See FALSE PRETENSES, 3; MASTER AND SERVANT, 3, 7; NEGLIGENCE, 12.

QUESTIONS OF LAW.

See NUISANCE, 1; RAILROAD COMPANIES, 16; SLANDER, 6.

RAILROAD COMPANIES.

- 1. RAILWAY EMBANKMENT, LIABILITY FOR SO CONSTRUCTING, AS TO INJURE ADJOINING LANDS. —** A railway company which constructs upon its right of way an embankment without culverts, in such a manner as to cause surface water to back upon and injure adjoining lands, is liable to the owner of the lands for the injury thereto. *Railway Co. v. Mossman*, 670.
- 2. CONDUCTOR, WHEN VICE-PRINCIPAL. —** A railroad conductor in charge of a train is exercising the functions of the master in giving ordinary directions and orders in the management and running of the train, so as to be chargeable with knowledge of every fact in relation thereto which is known, or of which the law imputes knowledge to the master. *Georgia Pacific R'y Co. v. Davis*, 47.
- 3. KNOWLEDGE OF COMPANY AS KNOWLEDGE OF CONDUCTOR. —** A railroad conductor in charge of a train is not chargeable with knowledge of de-

facts in the roadway known to the company. *Georgia Pacific R'y Co. v. Davis*, 47.

4. **VIOLATION OF RULES BY EMPLOYEES — CONTRIBUTORY NEGLIGENCE.** — A railroad conductor's assent to a violation of a rule of the company known to a brakeman will not relieve the latter of contributory negligence; if, however, the rule was unknown to him, its violation by him is not contributory negligence in case of injury. *Georgia Pacific R'y Co. v. Davis*, 47.
5. **VIOLATION OF RULES BY EMPLOYEES — CONTRIBUTORY NEGLIGENCE.** — Where a rule of a railroad company, of which a brakeman is ignorant, is habitually violated by the conductor, who knows of its existence, and the brakeman is injured in necessarily obeying an order from the conductor in violation of the rule, the necessity for which cannot be ascribed to the misconduct of the brakeman, negligence cannot be imputed to him; nor will the fact that he delayed a moment or two in taking necessary precautions before obeying the order constitute contributory negligence on his part, although instantaneous obedience would have prevented the injury. *Georgia Pacific R'y Co. v. Davis*, 47.
6. **INTOXICATED PASSENGER, LIABILITY FOR EXPULSION OF, WHEN SUBSEQUENTLY INJURED.** — An intoxicated passenger on a railroad train, by refusing to pay fare when it is rightfully demanded, becoming boisterous, and using profane and obscene language, renders himself an intruder or trespasser, and may be expelled without unnecessary force, due care being used not to expel him at such time, place, or under such circumstances that serious injury will naturally or probably result; and when such passenger is so expelled, he cannot recover for a subsequent injury to which he contributed by placing himself in a position of peril while so intoxicated. *Louisville etc. R. R. Co. v. Johnson*, 35.
7. **INTOXICATION OF PASSENGER AS CONTRIBUTORY NEGLIGENCE.** — When an intoxicated passenger, not so drunk as to be stupefied or unable to travel, is rightfully ejected from a railroad train at six o'clock on a dark evening, one mile from his home, in a locality with which he is familiar, and is subsequently injured during the night by another passing train, he cannot recover against the railroad company which ejected him. His expulsion in such case cannot be regarded as the natural and proximate cause of the injury, or as connected with it, except as he himself connected it by his voluntary intoxication. *Louisville etc. R. R. Co. v. Johnson*, 35.
8. **PASSENGER WRONGFULLY EJECTED FROM RAILWAY TRAIN MAY RECOVER FOR INJURIES RECEIVED IN MAKING REASONABLE RESISTANCE.** — A railway passenger who is lawfully in a car, having paid his fare, has the right to make reasonable resistance to an attempt to eject him; and if he is unlawfully ejected therefrom, the company will be liable for the damages occasioned to his person by his making reasonable resistance to prevent his removal. *Louisville etc. R'y Co. v. Wolfe*, 436.
9. **MISCONDUCT OF RAILWAY PASSENGER UNDER PROVOCATION NO EXCUSE FOR EXPELLING HIM WHEN.** — A railway company cannot justify the act of its conductor in expelling a passenger who has paid his fare, on account of his having, in the heat of passion, when falsely charged with the failure to pay, used improper, profane, and vulgar language in the presence and hearing of lady passengers. *Louisville etc. R'y Co. v. Wolfe*, 436.

10. **EXEMPLARY DAMAGES.**—A railway corporation is not answerable in exemplary damages for an assault on a passenger by one of its agents made in a malicious, unlawful, wanton, and unnecessary manner, when there is no evidence that it was ever authorized, ratified, or approved by the corporation, or that the servant was incompetent or of known bad character. *Ricketts v. Chesapeake etc. R'y Co.*, 901.
11. **TURN-TABLE, RAILWAY COMPANY'S DUTY AS TO FASTENING.**—In an action against a railway company to recover damages for injuries received by a boy nine years old while endeavoring to leap upon a revolving turn-table maintained by the company in a place away from the public road, but frequented by boys and others for recreation and sport, in which the declaration alleges that the defendant was negligent in maintaining the turn-table exposed and unclosed, and without any secure lock or fastening, and in which the proof shows that the turn-table was fastened by a sliding wooden bolt which passed in a slot under the cross-ties, and could not be moved without withdrawing this piece of timber, and that this bolt was removed by one of the plaintiff's companions, it is proper to charge the jury that the defendant was not required to so fasten or secure the turn-table that boys like the plaintiff could not displace such fastening and put the table in motion, and that the defendant was not required to fasten the turn-table any more securely than necessary to keep it securely in place. And the court should not qualify these instructions by charging the jury that in deciding whether the defendant was negligent or not, they might, among other things, consider the amount of force or strength required to unfasten the turn-table. *Bates v. Railway Co.*, 665.
12. **INSURANCE—RIGHT TO HAVE THE PROCEEDS OF, APPLIED IN MITIGATION OF DAMAGES.**—If a railway corporation is by statute made liable to the owner of property for damages resulting to him from its destruction by fire communicated by a locomotive-engine, it is not entitled to have moneys received from an insurance, effected by him on the same property, applied in mitigation of damages. On the contrary, the owner of the property may be regarded as holding his claim against the railway company in trust for the insurer. *Regan v. New York etc. R. R. Co.*, 306.
13. **FAILURE TO SIGNAL AT CROSSINGS—WHO MAY RECOVER.**—A statute requiring railroad companies to ring the bell or sound the whistle eighty rods before crossing a public highway is for the benefit of travelers upon the highway, either at the crossing, or before reaching or after crossing it, or traveling parallel with the track, and not for the benefit of farmers and their horses at work in adjoining fields. As to the latter, such statute imposes no duty on the company, and they cannot recover for its negligence in failing to give the required signals. *Williams v. Chicago etc. R. R. Co.*, 397.
14. **RAILWAY COMPANY RUNNING TRAINS IN CITY STREETS MUST OBSERVE STATUTORY PRECAUTIONS.**—A railway company running its trains over tracks laid in the streets of a city must observe the precautions, to prevent accidents, required by the statute. *Railway Co. v. Wilson*, 693.
15. **RAILWAY COMPANY RUNNING TRAIN WITH ENGINE IN REAR LIABLE FOR NOT OBSERVING STATUTORY PRECAUTIONS.**—A railway company that runs its trains with the engine in the rear, and which cannot, for that reason, observe the precautions against accidents required by the statute, is liable for injury inflicted by its trains while being run in that

manner. The statute contemplates the running of trains with the engine in front, but the company is not relieved from its statutory liability by changing the engine to the rear. *Railway Co. v. Wilson*, 693.

16. **NEGLIGENCE, WHEN QUESTION OF LAW.** — In an action against a railroad company to recover for a personal injury resulting in the death of a trespassing boy, seven years of age, by being run over by a train, the company should be declared not liable, as matter of law, notwithstanding its admitted negligence, in the absence of proof connecting the injury therewith, and showing that it was the direct consequence of such negligence. In such case it is reversible error to refuse to take the case from the jury and so declare the law. *Cumberland etc. R. R. Co. v. State*, 571.
17. **NEGLIGENCE — SUFFICIENCY OF COMPLAINT.** — Where a complaint charges actionable negligence and resulting injury against a railroad company, it is not rendered insufficient by additional defective allegations of the conductor's negligence concurring with that of the company. The latter may be disregarded, and the company still be liable for the injuries suffered through its own negligence. *Georgia Pacific R'y Co. v. Davis*, 47.
18. **NEGLIGENCE — INJURY TO BRAKEMAN.** — In an action by a brakeman against a railroad company to recover for an injury received in attempting to couple cars on a dark night, evidence that the company failed to furnish a sufficient number of suitable links with which to make the necessary couplings, that the conductor ordered such brakeman to make a coupling with an unsuitable link, and that an attempt to obey the order resulted in the injury sued for, will justify a recovery. *Denver etc. R. R. Co. v. Simpson*, 242.
19. **RULES AS EVIDENCE.** — In an action by a railroad brakeman against the company to recover for personal injury caused by its negligence, the rules of the company, not brought to his notice, are not admissible for the purpose of imputing negligence to him because of conduct on his part at variance with that which they prescribe. *Georgia Pacific R'y Co. v. Davis*, 47.
20. **DUTY TO TRAIN-MEN.** — **RAILROAD TRAIN-MEN HAVE THE RIGHT TO ASSUME** the adaptation and sufficiency of the roadway in all respects to a safe discharge of their duties in another and distinct branch of the business, and are not held to a knowledge which has never, in point of fact, been imparted to them, of defects and dangerous conditions in the culverts, bridges, tracks, embankments, road-bed, cuts, and tunnels of the railroad company, or of the dangerous nature of adjacent structures erected or permitted by the company. *Georgia Pacific R'y Co. v. Davis*, 47.
21. **ASSUMPTION OF RISKS BY TRAIN-MEN.** — It is the duty of a railway company to its train-men to provide a roadway in all respects reasonably safe for the running of its trains and the performance of the functions imposed on them by the exigencies of the service, and they have a right to assume, without inquiry or investigation, that this duty has been discharged. The *onus* of inquiry or investigation is not upon them, but if they know of the unsafe condition of the roadway, and continue in the service after the lapse of a reasonable time for the defect to be remedied or removed, they assume the additional risk, though originally not incident to their employment. *Georgia Pacific R'y Co. v. Davis*, 47.

22. **NEGLIGENCE. — PROJECTING ROCK** in the side of a railroad cut, not touching passing cars, but endangering the safety of brakemen in discharging their duty while ascending and descending ladders on the outside of the cars, is a defect in the roadway, rendering the company liable for resulting injuries to such brakemen, unless their negligence proximately contributed thereto. *Georgia Pacific R'y Co. v. Davis*, 47.
23. **NEGLIGENCE — CARE REQUIRED OF INJURED BRAKEMEN.** — Where a railroad company is guilty of negligence in failing to provide its train with a sufficient number of suitable links to make necessary couplings, and in directing its brakeman to use a defective link in making a coupling, the brakeman, in attempting to obey the order, is only required to exercise such care as might reasonably be expected from a person of ordinary care and prudence in the situation in which he was then placed, and if injured while in the exercise of such care, he is entitled to recover. *Denver etc. R. R. Co. v. Simpson*, 242.
24. **CONTRIBUTORY NEGLIGENCE OF BRAKEMAN.** — A brakeman on a railroad train, in the absence of notice, is not chargeable with knowledge of a projecting rock in the roadway, which endangers his safety while in the discharge of his ordinary duties, nor is his ignorance of it contributory negligence on his part in case of injury to him. *Georgia Pacific R'y Co. v. Davis*, 47.
25. **LIABILITY OF, FOR ACTS OF LESSEE.** — A railway corporation cannot, by lease or any other contract, in the absence of legislative authority, turn over to another corporation its road and the use of its franchise, and thereby exempt itself from responsibility for the conduct and management of the road. Therefore, a railway corporation cannot exonerate itself from liability to a passenger injured in an assault committed on him by a train-man, by proving that the portion of its road on which the assault occurred had been leased to and was being operated by another corporation. *Ricketts v. Chesapeake etc. R'y Co.*, 901.
26. **RAILWAY COMPANY RUNNING CARS IN CITY STREETS BOUND TO OBSERVE STATUTORY PRECAUTIONS.** — A railway company operating its trains over tracks lawfully laid in the streets of a city must comply with the statutory precautions for the prevention of accidents required to be observed by railroads. *Katzenberger v. Lawo*, 681.
27. **DUMMY LINE IS RAILROAD.** — A dummy line over which cars carrying passengers exclusively are drawn by small steam-engines called dummies is a railroad within the meaning of the statute prescribing the precautions to be observed by railroads. *Katzenberger v. Lawo*, 681.
28. **FRANCHISE GRANTED TO A STREET-RAILWAY CORPORATION GIVES IT NO EXCLUSIVE USE** of that portion of the street upon which its road is constructed, but only the right to construct such road in such place and manner as not to interfere with the use of the street by the public. *Pacific R'y Co. v. Wade*, 201.
29. **CHARTER TO STREET-RAILWAY COMPANY CONSTITUTES CONTRACT.** — A charter granted by a city council to a street-railway company to construct and operate a street-railway within the corporate limits of a city constitutes a contract between such railway company and the city. *Western Paving etc. Co. v. Citizens' etc. R'y Co.*, 462.
30. **CHARTER OF STREET-RAILWAY COMPANY STRICTLY CONSTRUED AGAINST IT.** — A charter granted by a city council to a street-railway company is to be strictly construed against the company. It has no doubtful rights under such charter; for where there are doubts they are construed

against the grantee, and in favor of the city. *Western Paving etc. Co. v. Citizens' etc. R'y Co.*, 462.

31. **EMINENT DOMAIN — PROCEEDINGS BY, WHEN NOT NECESSARY.** — If a general statute provides that two lines of street-railways, operated under different managements, may be permitted to use the same street by paying an equal portion for the construction of the track and appliances used by such railways jointly, but that in no case shall two lines operated under different managements occupy or use the same street and track for a distance of more than five blocks consecutively, every street-railway corporation constructing a railway under authority of such statute consents that its track may be used jointly with any other railway which the municipality may authorize to use it for the distance of five blocks, and hence cannot insist that such occupancy is a taking of private property for a public use, which can be authorized only under a statute relating to the exercise of the right of eminent domain. *Pacific R'y Co. v. Wade*, 201.
32. **CONSIDERATION FOR AMENDED CITY ORDINANCE, WHAT SUFFICIENT.** — Where a city ordinance, passed in 1864, authorizing a street-railway company to use the streets of the city to construct and operate a street-railway, provided that the company should bowlder the space between the rails of its track, and pave, bowlder, or otherwise improve and keep in repair two feet on the outside of each rail, was amended by an ordinance, passed in 1878, providing instead that the company should keep the tracks and two feet on the outside of each rail, together with all bridges and the crossings of all gutters, at all times, in good repair, both of which ordinances were accepted by the company, and the latter of which was passed in consideration that the company should unite its systems, charge a fare of five cents for transportation to any part of the city, and construct certain additional lines of railway within a specified time, a compliance by the company with the conditions of the amended ordinance was a sufficient consideration therefor, and when it was accepted by the company and its conditions complied with, it became a binding contract. *Western Paving etc. Co. v. Citizens' etc. R'y Co.*, 462.
33. **CITY COUNCIL CANNOT IMPOSE UPON STREET-RAILWAY COMPANY ADDITIONAL OBLIGATION TO PAVE STREET WHEN.** — Where a city ordinance provides that a street-railway company shall keep the space between the rails and two feet on the outside of each rail, together with all bridges and the crossings of all gutters, at all times, in good repair, the city cannot, by a subsequent ordinance, impose on the company, without its consent, the obligation to pay a proportionate share of the cost of paving a street occupied by its railway. *Western Paving etc. Co. v. Citizens' etc. R'y Co.*, 462.
34. **PAROL EVIDENCE INADMISSIBLE TO PROVE ADDITIONAL CONSIDERATION FOR WRITTEN CONTRACT WHEN.** — Where a city council, by an ordinance not accepted by a street-railway company, seeks to impose upon the company an additional obligation to pay for the improvement of a street, and such council, by a subsequent ordinance, grants to another company, which has purchased the railway from the former company, all the rights, privileges, and franchises of the old company, in consideration of its assuming all the duties and obligations of the latter, parol evidence is not admissible to prove that the new company, in consideration of the passage of the ordinance ratifying and approving the sale,

accepted the ordinance which sought to make the old company liable for such street improvement. *Western Paving etc. Co. v. Citizens' R'y Co.*, 462.

35. STREET-RAILWAY COMPANY NOT ESTOPPED TO DENY VALIDITY OF STREET ASSESSMENT WHEN. — A street-railway company whose property is not subject to assessment for street improvements is not estopped to deny its liability for the assessment, because it stands by without objection until the improvements are completed, where the city has the right to make the improvements and the company has no right to object. *Western Paving etc. Co. v. Citizens' etc. R'y Co.*, 462.
36. WHEN A STREET-RAILWAY CORPORATION IS IN CUSTODY OF THE COURT THROUGH ITS RECEIVER, and another like corporation has a right to use a portion of the former on paying an equal portion for the construction of the track and appliances, such court may, on petition, fix the amount to be paid by the petitioning corporation to acquire the right to use such track. *Pacific R'y Co. v. Wade*, 201.

See CARRIERS; NEGLIGENCE.

RAPE.

EVIDENCE OF THE GENERAL REPUTATION OF THE ACCUSED AS THAT OF A PEACEABLE AND LAW-ABIDING MAN is admissible in his favor when he is on trial charged with rape committed by assault and force. *Lincecum v. State*. 727.

See ASSAULT.

RATIFICATION.

See CORPORATIONS, 3; HUSBAND AND WIFE, 12.

REASONABLE DOUBT.

See HOMICIDE, 8; TRIAL, 7.

RECEIVERS.

1. RECEIVER OF A CORPORATION MAY, WITH THE PERMISSION OF THE COURT, DO ANYTHING which the corporation might lawfully have done to make the most out of its assets. *Pacific R'y Co. v. Wade*, 201.
2. RECEIVER OF CORPORATION — AMOUNT TO BE PAID TO OR BY, HOW MAY BE FIXED — JURY TRIAL — When there is a claim for damages or compensation in favor of a corporation whose property is in the hands of a receiver, it may be adjusted upon a petition to the court in which the receiver is acting, which may proceed to determine the issues involved in the petition without the aid of a jury. *Pacific R'y Co. v. Wade*, 201.

See CREDITORS' SUITS; LIMITATIONS OF ACTIONS, 7, 8.

RECEIVING STOLEN GOODS.

1. CONVICTION OF THIEF NOT NECESSARY TO SUSTAIN PROSECUTION FOR BUYING STOLEN PROPERTY FOR GAIN. — Under the Illinois statute, the offense of receiving, or buying, or aiding in concealing stolen property for gain, or to prevent the owner from repossessing himself thereof, with knowledge that it has been stolen, is made a substantive crime, subject to punishment, without reference to the trial or conviction of the person committing the larceny. *Huggins v. People*, 357.
2. BUYING STOLEN PROPERTY FOR GAIN — EVIDENCE OF. — To convict of buying stolen property for gain, when the buying is admitted, the state

must prove the guilty knowledge of the accused that the property was stolen at the time of the purchase. This may be shown by proof of attending facts and circumstances, from which, by the common understanding and experience of men, the inference of the fact arises; as that the purchase was for much less than the real value; that the accused denied that the property was in his possession, or concealed it; his failure to make reasonable explanation; the evil reputation of the person from whom purchased or received, or the like. *Huggins v. People*, 357.

3. **BUYING STOLEN PROPERTY FOR GAIN.** — To CONVICT of buying stolen property for gain, the guilty knowledge of the accused of the theft at the time of purchase is the gist of the offense, and must be alleged, proved, and found by the jury as a fact; but in finding such fact the jury will be justified in presuming that the accused acted rationally, and that whatever would convey knowledge or induce belief in the mind of a reasonable person, would, in the absence of countervailing evidence, be sufficient to apprise the accused of the like fact, or induce in his mind the like impression and belief. *Huggins v. People*, 357.
4. **BUYING STOLEN PROPERTY FOR GAIN.** — To secure conviction for buying stolen property for gain, the name of the thief, or of the person from whom the defendant received or bought the stolen property, not being matter necessary to the identification of the offense, need not be alleged or proved; but where the pleader unnecessarily alleges the commission of the larceny by a particular person, or that the property was bought or received of a particular person, the allegation becomes matter of description, and must be proved as laid. *Huggins v. People*, 357.
5. **BUYING STOLEN PROPERTY FOR GAIN — GUILTY KNOWLEDGE.** — To convict of buying stolen property for gain, the guilty knowledge of the theft possessed by the accused at the time of the purchase need not be that actual or positive knowledge which one acquires by personal observation of the fact. It is sufficient if the circumstances were such, accompanying the transaction, as to make the accused believe that the goods had been stolen. *Huggins v. People*, 357.
6. **EVIDENCE — JUDGMENT.** — ON THE TRIAL OF AN INDICTMENT FOR RECEIVING PROPERTY knowing it to have been stolen, a judgment convicting and sentencing another person for stealing the same property, together with the indictment on which it was found, is admissible in evidence against the accused for the purpose of showing that such property had been stolen by such other person. *Cooper v. State*, 712.
7. **EVIDENCE.** — THE DECLARATION OF ONE WHO HAS BEEN CONVICTED OF stealing property, that another person indicted for receiving it, knowing it to have been stolen, had no connection with the theft, and had bought the property in good faith and for value, is not admissible in favor of the latter. *Cooper v. State*, 712.

REGISTRATION.

See CORPORATIONS, 14.

REPLEVIN.

1. **WRIT OF REPLEVIN, SERVICE OF.** — It is not material whether a writ of replevin is served by a constable or the sheriff. *Smith v. Eals*, 486.
2. **REPLEVIN IS A PROPER REMEDY FOR THE RECOVERY OF DRAFTS executed by the plaintiff, and which have become void by reason of their subsequent fraudulent alteration.** *Smith v. Eals*, 486.

3. **REPLEVIN AGAINST OFFICER.** — Replevin will lie in any state court of competent jurisdiction against an officer, in favor of the owner of goods seized by such officer, upon a writ against a third person, in an attachment suit pending in any other of the courts of the state. *Carpenter v. Innes*, 255.
4. **PROCESS, WHEN NO PROTECTION TO OFFICER.** — Where the evidence in an action of replevin against an officer shows that he has taken property which did not belong to the party against whom the process ran, the taking is wrongful, and the process affords him no protection. *Carpenter v. Innes*, 255.
5. **FORM OF VERDICT IN ACTIONS OF CLAIM AND DELIVERY.** — A verdict stating that the jury find for the defendant and fix the value of the property at fifteen hundred dollars is sufficient to support a judgment in favor of the defendant for the return of the property to him, or for the value thereof in case the delivery cannot be had. *Etchepare v. Aguirre*, 180.
6. **JUDGMENT, FORM OF, IN ACTIONS OF CLAIM AND DELIVERY.** — A judgment that the defendant recover of the plaintiff a sum of money, or the return of the property described in the complaint and his costs, is not authorized by the Code of Civil Procedure of California, which declares that such judgment shall be "for the return of the property, or the value thereof in case the return cannot be had." *Etchepare v. Aguirre*, 180.
7. **EXECUTION, DAMAGES FOR DELAY IN SERVING.** — Where the service of an execution has been delayed by a suit in replevin, the defendant in replevin is entitled, as damages for the delay, to statutory interest on the value of the goods owned by the execution defendant. *Burton v. Kennedy*, 769.

RESCISSION.

See **VENDOR AND PURCHASER**, 12.

RES JUDICATA.

See **MORTGAGES**, 1.

RES GESTÆ.

See **EVIDENCE**, 5, 6.

RESTITUTION.

See **JUDGMENT**, 6.

RESTRAINT OF ALIENATION.

See **DEVISES**, 5.

REVERSAL.

See **APPEAL AND ERROR**.

RIPARIAN RIGHTS.

See **WATERCOURSES**.

RULES.

See **COURTS**.

SALES.

1. **SALES ARE PRESUMED TO BE FOR CASH on delivery, in the absence of proof to the contrary.** *Cleveland v. Pearl*, 748.
2. **IMPLIED PROMISE TO PAY FOR GOODS transferred from one person to another will not arise from the mere fact of their being received and used, when it was understood by the parties at the time that the goods were not to be paid for.** *Lyndon Mill Co. v. Lyndon L. & B. Inst.*, 783.
3. **CHANGE OF POSSESSION.** — While it is possible for a vendee of chattels to employ the vendor and yet make such a change of possession as will support a sale, yet if the vendor is left in entire charge of the property which he has sold, or so apparently in charge that there is no visible change in its possession, and nothing to indicate that any change has taken place in the title or possession, then there is no such actual change of possession as is required by law. *Etchepare v. Aguirre*, 180.
4. **CHANGE OF POSSESSION.** — The fact that chattels are so situated that the vendee is entitled to and can lawfully take possession at his pleasure is not equivalent to the actual change of possession required by the statute. *Etchepare v. Aguirre*, 180.
5. **EVIDENCE OF WHAT A VENDOR DID AND SAID AFTER A SALE of chattels is admissible against his vendee, if it is pertinent to the issue whether or not the sale had been accompanied by an immediate delivery and followed by an actual and continued change of possession.** *Etchepare v. Aguirre*, 180.
6. **STATUTE OF FRAUDS — MEMORANDUM OF SALE cannot satisfy the statute of frauds, unless it either names the vendors, or describes them so that they can be identified by other evidence. Where the sale is at public auction, and the advertisement of sale states that it is to be made "to settle the estate of John Higgins," a memorandum of the sale, made by the auctioneer, neither naming the vendors nor describing them, except to designate them as the "sellers," is fatally defective, though the parties for whom the sale was made were either the devisees of John Higgins or grantees from such devisees.** *McGovern v. Hern*, 632.

See AGENCY, 4.

SAVINGS BANKS.

See BANKS AND BANKING, 3-7; BILLS AND NOTES, 1.

SCIRE FACIAS.

See ATTACHMENT, 4.

SEDUCTION.

1. **SEDUCTION BY MEANS OF A PROMISE TO MARRY is committed if the man has carnal intercourse to which the woman's assent was obtained by a promise of marriage, made by the man at the time, and to which, without such promise, she would not have yielded.** *Putnam v. State*, 738.
2. **TO SEDUCE means, when used with reference to the conduct of a man towards a female, an enticement of her on his part to surrender her chastity by means of some art, influence, promise, or deception calculated to accomplish that object, and to include the yielding of her person to him as much as if it was expressly stated.** *Putnam v. State*, 738.
3. **INSTRUCTIONS.** — A conviction for seduction will be reversed if the judge did not fully instruct the jury concerning the meaning of the word "seduction" as used in the statute. *Putnam v. State*, 738.

SEISIN.

See COVENANTS, 1, 2.

SELF-DEFENSE.

See HOMICIDE, 1-3.

SERVITUDES.

See EASEMENTS.

SET-OFF.

EXEMPTIONS — WAGES EXEMPTED NOT LIABLE TO SET-OFF WHEN. — Laborers' wages to the amount of thirty dollars are exempt by the statute, and cannot be subjected to a set-off by a claim in no way springing out of the contract relations between the parties, but arising out of a distinct and independent transaction. *Collier v. Murphy*, 698.

See INSURANCE, 19.

SLANDER.

1. **MALICE IS THE FOUNDATION** of the action of slander, and is ordinarily implied; but there may be justification from the occasion, and when this appears, the words must be proved to be malicious as well as false. *Fresh v. Cutter*, 575.
2. **ACTIONABLE WORDS — PRIVILEGED COMMUNICATION.** — In an action for slander based on a voluntary communication made by a former master to an existing or prospective employer of the former's discharged servant, that the latter "stole as good as two hundred dollars from me, and I want my money," if the proof shows that the communication was made in good faith, under an honest belief of its truth, and a conviction of duty to disclose it, it is privileged, and not actionable; but if it was false, and was maliciously communicated, without any duty to disclose it, it is not privileged, and is actionable. *Fresh v. Cutter*, 575.
3. **JUSTIFICATION FROM OCCASION**, in actions for slander, arises when an actionable communication is made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, legal, moral, or social, if made to a party having a corresponding interest or duty. *Fresh v. Cutter*, 575.
4. **MEASURE OF DAMAGES — ERRONEOUS INSTRUCTIONS.** — In an action for slander based on a voluntary communication claimed by the defense to be privileged, it is reversible error to instruct the jury that they may award the plaintiff punitive damages, without requiring them to find the existence of actual malice, and to consider the facts in evidence in regard to the occasion of the communication, the motive which inspired it, the honesty, good faith, and belief in its truth in uttering it. *Fresh v. Cutter*, 575.
5. **CHARACTER OF SERVANT — PRESUMPTION — PRIVILEGED COMMUNICATION.** — When a master gives a character to a servant, and is sued therefor in slander, it is presumed, in the absence of proof to the contrary, that the character was given without malice; and to support the action it must be proved that the character was both falsely and maliciously given; and though as given it is untrue in fact, the master will be justified by the occasion, unless it is shown that he was actuated by malice, and knowingly stated what was false and injurious. In such case, the state-

ment, if made in response to inquiry, is privileged, and if voluntarily made, is nevertheless privileged, if made honestly, fairly, and without malice. *Fresh v. Cutter*, 575.

6. **PRIVILEGED COMMUNICATION, WHEN QUESTION OF LAW OR FACT.** — In actions for slander, it is a question for the court whether or not the statement sued upon, if made in good faith and without malice, is privileged; but the plaintiff has the right, notwithstanding the privileged character of the communication, to go to the jury, if there is evidence tending to show actual malice, as when the words unreasonably impute crime, or the occasion of their utterance is such as to indicate, by its unnecessary publicity, or otherwise, a purpose wrongfully to defame the plaintiff. *Fresh v. Cutter*, 575.
7. **SLANDER OF TITLE, ACTION FOR, MAINTAINABLE AGAINST WHOM.** — An action for slander of title lies against one who falsely and maliciously disparages the title of another to property, whether real or personal, and thereby causes him some special pecuniary loss or damage as the direct and natural result of the words spoken. *Burkett v. Griffith*, 151.
8. **COMPLAINT IN ACTION FOR SLANDER OF TITLE MUST DESCRIBE PROPERTY DISPARAGED.** — In an action for slander of title to land, it is necessary for the plaintiff in his complaint to set forth and describe the property respecting which the defamatory statements have been made, and also to aver his title thereto, so that it may be shown wherein the defendant has done him any injury. *Burkett v. Griffith*, 151.
9. **PLEADING IN ACTION FOR SLANDER OF TITLE CONSTRUED AGAINST PLEADER WHEN.** — Where a complaint in an action to recover damages for slander of title avers an offer from a third person to purchase, and an acceptance of the offer by the plaintiff, and that by reason of the words spoken by the defendant such third person was intimidated, dissuaded, and deterred from carrying out his agreement with the plaintiff, it will be construed against the pleader, as intended to aver a complete and executed contract of purchase and sale between the plaintiff and such third person. *Burkett v. Griffith*, 151.
10. **ARGUMENTATIVE PLEADING NOT PERMISSIBLE WHEN.** — A complaint in an action for slander of title which alleges that the defamatory statements made by the defendant were, that the plaintiff had broken the covenants of leases, attached to the complaint as exhibits, and made part thereof only for the purpose of identifying the lands referred to, containing an option to purchase, and that plaintiff had forfeited all rights thereunder, and which alleges that he had a leasehold interest, with option and privilege of purchasing, but which does not directly allege the nature or extent of his leasehold interest, or the terms of his option, or what were the covenants of his leases, or the nature of his rights thereunder, and which shows those matters of substance argumentatively only by inference from the contents of the exhibits, fails to show that the statements and declarations of the defendant could have caused any damage or injury to the plaintiff. *Burkett v. Griffith*, 151.
11. **ACTION FOR SLANDER OF TITLE, WHAT NECESSARY TO MAINTAIN.** — To maintain an action for slander of title, it is necessary to establish that the words spoken were false, and were maliciously spoken by the defendant, and also that the plaintiff has sustained some special and pecuniary damage as the direct and natural result of their having been so spoken. And as words spoken of property are not in themselves actionable, the complaint in such action should distinctly and particularly set out the

- facts which show wherein the plaintiff has sustained special damage. *Burkett v. Griffith*, 151.
- 12. WORDS UTTERED AFTER CONTRACT OF SALE OF LAND NOT GROUND FOR ACTION FOR SLANDER OF TITLE.** — Where words slandering a title are uttered after a sale of land has been completed, or agreed upon and contracted for, so as to give the plaintiff a contract capable of being enforced, he does not suffer any actionable damage from their utterance, although the purchaser was thereby deterred from performing his contract or induced to violate it. In order to show that the words uttered have caused injury to the plaintiff, it is generally necessary to aver and show that they were uttered pending some treaty or public auction for the sale of the property, and that thereby some intending purchaser was prevented from bidding or competing. *Burkett v. Griffith*, 151.
- 13. REFUSAL TO SELL TO LESSEE HAVING OPTION TO PURCHASE NOT SLANDER OF TITLE.** — An allegation in a complaint in an action for slander of title, that the defendant had stated that he would not sell the lands described in leases from him to the plaintiff, containing an option to purchase, cannot be regarded as charging a slander of title, especially where it is not alleged that an intending purchaser was informed of such declaration. *Burkett v. Griffith*, 151.
- 14. ORIGINATOR OF SLANDER OF TITLE LIABLE ONLY FOR DAMAGE RESULTING DIRECTLY AND NATURALLY FROM HIS ACT.** — The originator of a slander of title is only liable for such damage as is the direct and natural result of his act, and is not liable for the subsequent repetition by another, without his direction or authority, of words not in themselves actionable. *Burkett v. Griffith*, 151.
- 15. BOTH INJURY AND DAMAGE ESSENTIAL FOR MAINTENANCE OF ACTION FOR SLANDER OF TITLE.** — To sustain an action for slander of title, there must be both injury and damage. The slanderous words, false in fact and maliciously uttered, constitute the injury and give the right of action, and the pecuniary damage sustained is the measure of recovery. *Burkett v. Griffith*, 151.

See LIBEL.

SLANDER OF TITLE

See SLANDER, 7-15.

SPECIFIC PERFORMANCE.

See PARTNERSHIP, 5.

STATUTE OF FRAUDS.

See CONTRACTS, 10-15; EXECUTION, 7; LEASE, 1; SALES, 6; VENDOR AND PURCHASER, 1, 2.

STATUTE OF LIMITATION.

See LIMITATIONS OF ACTIONS.

STATUTES.

- 1. STATUTES, HOW SHOULD BE INTERPRETED.** — Every statute should be construed, not according to the letter, but according to the meaning. The intention must govern, although such construction may not, in all respects, agree with the letter of the statute. *Rutledge v. Crawford*, 212.

2. **CONSTITUTIONAL LAW — LOOKING BEHIND STATUTE TO SEE WHETHER IT IS CONSTITUTIONAL.** — If a statute appears on its face to be constitutional and valid, the court cannot inquire into the motives of the legislature, or the consideration upon which it was founded, and then disregard it if it would have been unconstitutional had such circumstances or consideration appeared on its face. *Stevenson v. Colgan*, 230.
3. **CONSTITUTIONAL LAW — STATUTE CANNOT BE ASSAILED AS GIFT** and declared void as in violation of a clause of the constitution forbidding the making of any gift, when the purpose of the statute as disclosed by its contents is proper and within the legislative power. *Stevenson v. Colgan*, 230.
4. **CONSTITUTIONAL LAW — GIFTS.** — A STATUTE DOES NOT APPEAR TO BE VOID AS A GIFT from the fact that it directed a designated sum to be paid monthly to a particular person in full satisfaction of all claims he may have, or claim to have, against the state, such payments to cease should he die before the expiration of the time named. *Stevenson v. Colgan*, 230.
5. **CONSTITUTIONAL LAW — EQUAL RIGHTS.** — THE RIGHTS OF EVERY INDIVIDUAL must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances, and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void. *State Goodwill*, 863.
6. **CONSTITUTIONAL LAW.** — THE POLICE POWER, however broad and extensive, is not above the constitution, and must be exercised in subordination to it. *State v. Goodwill*, 863.
7. **CONSTRUCTION OF.** — A STATUTE LIMITING THE RIGHT OF NON-RESIDENT CORPORATIONS to do business, and imposing a fine for doing business before complying with the statute, such statute, being in derogation of the common law, and penal in character, should be strictly construed. *Toledo T. & L. Co. v. Thomas*, 925.
8. **CONSTITUTIONAL LAW.** — RETROSPECTIVE LAW, if conformable to natural justice, will be recognized and enforced. Therefore a law which binds a party by a contract into which he had attempted to enter, but which is invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, is not unconstitutional. *Town of Bellevue v. Peacock*, 552.
9. **CONSTITUTIONAL LAW.** — STATUTE CREATING A LIABILITY against the owner of an abutting lot for an improvement for which, when made, its owner was neither legally nor equitably liable, is unconstitutional, and where the improvement was done under a contract entered into by a town, providing for its payment at the cost of the abutting land-owners, but the charter of the town did not give it the power to improve the street at the cost of such owners. *Town of Bellevue v. Peacock*, 552.
10. **CONSTITUTIONAL LAW — LEGISLATURE MAY PROVIDE THAT TIE VOTE BE DETERMINED BY LOT.** — An act of the legislature, which provides that where an election results in a tie vote for opposing candidates the judges of election shall determine by lot the person entitled to the

office, is valid, and does not conflict with a constitutional provision requiring all elections to be by ballot. *Johnston v. State*, 412.

11. **CONSTITUTIONAL LAW — EMPLOYERS AND EMPLOYEES.** — A statute declaring that it shall be unlawful for any person, firm, or corporation engaged in mining or manufacturing, and interested in merchandising, to knowingly and willfully sell any merchandise or supplies to any employee at a greater per cent of profit than when selling merchandise or supplies of like quality, character, and quantity to other customers buying for cash, and not employed by them, is void, because it is class legislation, and an unjust interference with the rights, privileges, and property of both the employer and the employee. *State v. Fire Creek etc. Co.*, 891.
 12. **CONSTITUTIONAL LAW — EMPLOYERS AND EMPLOYEES.** — A statute declaring that all persons engaged in mining coal, ore, or other minerals, or mining or manufacturing them, or either of them, or manufacturing iron or steel, or both, or any other kind of manufacturing, shall not issue, for the payment of labor, any order or other paper, unless the same purports to be redeemable at its face value in legal money of the United States, bearing interest at the legal rate, made payable to the employee or bearer, and redeemable within thirty days by the maker thereof, is unconstitutional and void. *State v. Goodwill*, 863.
 13. **POLICE POWER — REGULATION OF SALE OF INTOXICATING LIQUORS — CONSTITUTIONAL LAW.** — A statute providing that no license for the sale of intoxicating liquors by retail shall be granted, except to citizens of the United States of temperate habits and good moral character, is a valid exercise of the police power of the state as to both citizens and aliens, and is not in conflict with the fourteenth amendment to the United States constitution, providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws." *Trageser v. Gray*, 587.
- See ATTACHMENT, 1; ELECTIONS, 1; LEGISLATURE; LOTTERIES, 2, 4.

STOCK AND STOCKHOLDERS.

See CORPORATIONS, 15-21; EXECUTORS AND ADMINISTRATORS, 1.

STREET-RAILWAYS.

See RAILROAD COMPANIES, 28-36.

STREETS.

See MUNICIPAL CORPORATIONS, 12, 13.

SUBROGATION.

See DEBTOR AND CREDITOR, 2.

SUICIDE.

See INSURANCE, 28.

SUMMONS.

See ATTACHMENT, 3.

SUNDAY.

See INSURANCE, 57.

SURRENDER.

See LANDLORD AND TENANT; LEASE.

TAXATION.

See CONTRACTS, 13.

TENDER.

See INSURANCE, 40.

TICKETS.

See CARRIERS, 6.

TORTS.

See CORPORATIONS, 11; MUNICIPAL CORPORATIONS, 9.

TRADE-MARKS.

1. A TRADE-MARK MAY CONSIST of a name or a device, or a peculiar arrangement of words, or words with some device of greater or less novelty, which have been applied to designate the goods manufactured by a particular person; and when the manufacturer has thus adopted a trade-mark, he thereby acquires the right to whatever profits may result from his superior skill, knowledge, or honesty of purpose, and this right cannot be impaired by any piratical use of the device by another. *Solis Cigar Co. v. Pozo*, 279.
2. THE WORDS "FABRICA TOBACOS" are of common use in the tobacco trade, and, standing alone, are not the subject of a trade-mark. *Solis Cigar Co. v. Pozo*, 279.
3. MATERIAL MISREPRESENTATION. — The word "Habana" on a cigar-label claimed as a trade-mark, when in fact the cigars on which the label appeared were made Havana filler, is such a material misrepresentation and deceit on the public as will deprive the owner of any relief or protection against an infringement. *Solis Cigar Co. v. Pozo*, 279.
4. IMMATERIAL MISREPRESENTATION. — The word "copyrighted" on a cigar-label claimed as a trade-mark, when in fact it has not been copyrighted, is not such a misrepresentation as will prevent the owner from receiving relief and protection against infringement. *Solis Cigar Co. v. Pozo*, 279.
5. EQUITABLE ASSIGNMENT OF. — Where the assignee of a trade-mark, who is also the successor of the original owner, continues to use it with the consent and procurement of the latter, without a formal transfer of the right, he will be treated as the equitable owner, and awarded relief against an infringement, notwithstanding the informality of the transfer. *Solis Cigar Co. v. Pozo*, 279.
6. RIGHTS OF ASSIGNEE OF. — If certain formulas, wrappers, and trade-marks have been used in the manufacture and sale of a patent medicine, but the person who manufactured and sold them has died, and his business has been discontinued, no one can acquire from the representative of the deceased any exclusive right to the use of the trade-marks as against another who had previously lawfully obtained the formulas for the preparation of the medicines. *Covell v. Chadwick*, 625.
7. INFRINGEMENT — WHAT CONSTITUTES. — Exact similarity is not necessary to constitute an infringement of a trade-mark; for colorable imi-

tations are as much the subject of legal redress as exact or perfect similitudes. What is necessary in all cases to constitute an infringement is a similarity which will operate to convey a false impression to the ordinary purchaser, and serve to deceive and mislead him. Hence it is always essential to show that the imitation is of a character to escape the ordinary care and caution used in the purchase of the articles protected. *Solis Cigar Co. v. Pozo*, 279.

3. **INFRINGEMENT — INJUNCTION.** — The use of a cigar-label will not be enjoined on the ground that it infringes another's trade-mark, unless the two devices, taken as a whole, — words, pictures, lines, and devices, — are so similar that a purchaser, using the ordinary care and caution which may be expected of the purchasing public, would be likely to mistake the one for the other. *Solis Cigar Co. v. Pozo*, 279.

TRESPASS.

See **ARREST.**

TRIAL

1. **NONSUIT SHOULD NOT BE GRANTED IF THERE IS SUBSTANTIAL EVIDENCE** produced by the plaintiff in support of his case which should be weighed and considered by the jury. *O'Brien v. Miller*, 320.
2. **NONSUIT, RIGHT OF PLAINTIFF TO ENTER.** — If a cause is tried before the court without a jury, and the plaintiff's case depends upon evidence which is objected to, but the objection is not passed upon until the court announces its final decision, and therein sustains the objection, the plaintiff has the right, of which the court cannot deprive him, to at once order a judgment of nonsuit to be entered, as he could have done had the court excluded the evidence when it was offered. *Thrasher v. Ballard*, 894.
3. **AMENDMENT OF COMPLAINT DURING TRIAL CURES ERROR WHEN.** — Where evidence, immaterial when admitted, is rendered material by an amendment of the complaint during the trial, the error is cured. *Curtiss v. Aetna Life Ins. Co.*, 114.
4. **EVIDENCE TO BE CONSIDERED IN DETERMINING WHAT FACTS ARE PROVEN.** — In determining what facts are proved in a case, the jury should carefully consider all the evidence given, with all the circumstances of the subject-matter of the inquiry as detailed by the witnesses. *Insurance Co. v. Bennett*, 685.
5. **EVIDENCE, THE ONLY PURPOSE OF WHICH MUST BE TO PREJUDICE A PARTY** in the minds of the jury, should be excluded. *Dietz v. Providence etc. Ins. Co.*, 908.
6. **INSTRUCTIONS.** — While, under the statute, the appellant need not note his exceptions to the instructions given, the record on appeal should nevertheless show that by proper objection he called the attention of the court to the alleged error, and thus gave opportunity for its correction at the time. *Wray v. Carpenter*, 265.
7. **REASONABLE DOUBT, INSTRUCTIONS CONCERNING, WHERE EVIDENCE PURELY CIRCUMSTANTIAL.** — In a case where the evidence as to the defendant's guilt is purely circumstantial, the evidence must lead to the conclusion so clearly and strongly as to exclude every reasonable hypothesis consistent with innocence. In a case of that kind an instruction in these words is erroneous: "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the

mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty." It is not enough that the evidence necessarily leads the mind to a conclusion, for it must be such as to exclude a reasonable doubt. Men may feel that a conclusion is necessarily required, and yet not feel assured beyond a reasonable doubt that it is a correct conclusion. *Rhodes v. State*, 429.

8. **VERDICT—AFFIDAVIT OF JUROR TO IMPEACH.**—Affidavits of jurors stating the theory or ground upon which they rendered their verdict will not be received for the purpose of impeaching it, except in special cases. *Wray v. Carpenter*, 265.
9. **RELATIONSHIP OF JUROR TO COUNSEL NOT GROUND FOR SETTING ASIDE VERDICT WHEN.**—The fact that a juror was permitted to serve, who was the husband of a niece of one of the defendant's attorneys, is not a ground for setting aside the verdict. *Miller v. Louisville etc. R'y Co.*, 416.
10. **JUROR WITH DEFECTIVE EYESIGHT NOT COMPETENT.**—A person whose eyesight is so defective that he cannot see the expressions of witnesses testifying, nor observe their deportment or demeanor, is not competent to serve as a juror, even in cases where the testimony consists entirely of the statements of the witnesses, much less in a case where various articles are placed before the jury and used as illustrative of the testimony, none of which are seen by him. And the defendant is not negligent in such a case, where his counsel fully examines the juror, and such juror answers the questions asked him in such a way as to disarm suspicion of his disqualification, and there was nothing to indicate that his eyesight was defective. *Rhodes v. State*, 429.
11. **A JURY WILL BE PRESUMED TO HAVE OBEYED THE INSTRUCTIONS OF THE COURT,** and to have disallowed every item which, under such instructions, ought not to be included in their verdict. *Stanton v. French*, 174.

See APPEAL AND ERROR; RECEIVERS, 2

TROVER.

CONVERSION BY SELLING STOLEN CERTIFICATES OF STOCK.—A STOCK-BROKER WHO SELLS certificates of stock received by him for sale from one who had stole them is guilty of a conversion of them, and is liable to the true owner of the stock for its value, although the thief, at the time he delivered to him the stock, represented himself to be its owner, and the broker, in good faith, and without notice of the theft, sold the stock and paid to the thief the proceeds of the sale. And in an action to recover the value of such stock, it is no defense that the defendant, in selling the stock, acted as agent for a third person, who claimed to own it, although he acted in good faith, and in ignorance of such third person's want of title. *Swim v. Wilson*, 110.

TRUST DEEDS.

See TRUSTS.

TRUSTS.

1. **TRUST BY IMPLICATION.**—No trust will be implied merely from words indicating the motives inducing a gift. Whenever the disposition of the property by will or otherwise imports absolute and uncontrolled ownership, and a clear discretion and choice to act or not to act is also given,

- equity will not construe a trust from the language employed. *Randall v. Randall*, 373.
2. JURISDICTION OF COURT TO APPOINT TRUSTEE OF LAND IN ANOTHER STATE. — Where a deed of trust respecting land in another state, made and executed in this state, expressly provides that if the trustee named in it shall fail or refuse to accept or carry out the trust, a new trustee may be appointed by a court of competent jurisdiction, a court of this state which has acquired jurisdiction of the parties, may, upon the refusal of the trustee named in the deed to act, appoint a new trustee to carry out the trust. *Smith v. Davis*, 92.
 3. SIGNATURE OF TRUSTEE NOT ESSENTIAL TO VALIDITY OF TRUST DEED. — It is not essential to the validity of a trust deed that it shall be signed by the trustee, although it was intended to be signed by him, where the other parties who sign it expressly agree that it shall be binding as between them regardless of the trustee. *Smith v. Davis*, 92.
 4. THE TRUSTEE'S ASSENT IS NOT NECESSARY to the validity of a trust deed; nor does the fact that he is incompetent to act render the trust void as between the parties thereto, but a court of competent jurisdiction has power to substitute a new trustee to enforce the trust and carry out its objects. *Smith v. Davis*, 92.
 5. TRUST DEED — ASSIGNEE AS TRUSTEE. — When a trust deed of land is made to one as assignee, in consideration of an assignment for the benefit of creditors to be made by the grantor, and such assignment is never executed, the grantee takes and holds the legal title in trust for the grantor and his heirs. *McDermith v. Voorhees*, 286.
 6. POWER OF COURT, WITHOUT NOTICE, TO APPOINT NEW TRUSTEE. — The jurisdiction of a court to appoint the successor of a deceased trustee is a quasi jurisdiction *in rem*, capable of being exercised without giving any notice to any person interested in the trust. Therefore, the appointment of a new trustee is valid, though made without notice to the trustor or his successor in interest. *Dyer v. Leach*, 171.
 7. INTERESTS WHICH DO NOT PASS TO ASSIGNEE IN INSOLVENCY. — If property is devised or bequeathed to a trustee, to hold in trust for the benefit of the testator's daughter, in a will which declares that no part of the property "shall, before the payment, or conveyance, or transfer thereof to such child, be assignable, or attachable, or trusteeable, or in any way or manner liable for, or liable to be taken for, any debt, liability, or contract of such child, or be applied in any way or manner to the payment thereof," the interest of the beneficiary does not pass to and is not recoverable by her assignee in insolvency, under the statute which provides that a conveyance shall be made to him which shall "convey to the assignee all the estate, real and personal, of the debtor, except such as is by law exempt from attachment." *Billings v. Marsh*, 635.
- See HUSBAND AND WIFE, 9; LIMITATIONS OF ACTIONS, 5; PARTIES; WILLS, 3.

VENDOR AND PURCHASER.

1. STATUTE OF FRAUDS — RECEIPT GIVEN BY VENDOR OF LAND IS CONTRACT FOR SALE OF LAND WHEN. — A memorandum signed by a vendor of land, acknowledging the receipt of a certain sum of money as a deposit and part payment on account of a sale of certain land therein described, for a price specified, and providing that the deposit shall be forfeited if the further payments of purchase-money therein specified are not made, and that it shall be returned to the purchaser if the title prove to be

- defective, is not an agreement for the purchase of an option, but is a contract for the sale of lands. *Easton v. Montgomery*, 123.
2. **STATUTE OF FRAUDS—MEMORANDUM OF SALE OF LAND SUFFICIENT TO SATISFY.**—A memorandum signed by a vendor of land acknowledging the receipt of a deposit on account of the purchase price satisfies the statute of frauds, although it is not signed by the purchaser; and its execution and delivery by the vendor to the vendee are a sufficient consideration to support a promise on the part of the latter to pay the money therein named as the price of the land. *Easton v. Montgomery*, 123.
 3. **A CONTRACT FOR THE PURCHASE OF LAND** is not negotiable, and cannot be enforced by one who acquires title to the land from the vendors after the contract is made. *McGovern v. Hern*, 632.
 4. **VENDOR OF LAND NEED NOT BE ABSOLUTE OWNER WHEN HE CONTRACTS TO SELL IT.**—It is not necessary that a vendor of land be the absolute owner thereof at the time when he enters into an agreement to sell it. If the agreement is made by him in good faith, and he has at the time such an interest in the land, or is so situated in reference thereto, that he can carry into effect the agreement on his part at the time when he has agreed so to do, it will be upheld. *Easton v. Montgomery*, 123.
 5. **CONDITION THAT VENDOR'S TITLE IS GOOD IMPLIED IN CONTRACT FOR SALE OF LAND.**—In every executory contract for the sale of land there is an implied condition that the title of the vendor is good, and that he will transfer to the purchaser, by his deed of conveyance, a title unencumbered and without defect. This condition is, however, sufficiently complied with if he is able to give a good title at the time when, by the terms of his contract of sale, he is called upon to make a conveyance, and he has no right to recover back the deposit paid by him, merely because the vendor's title was defective at the date of the contract. *Easton v. Montgomery*, 123.
 6. **THE EQUITABLE TITLE AS BETWEEN THE VENDOR AND VENDEE**, upon the execution of a valid contract for the sale and purchase of land, is, for most purposes, regarded as being in the latter. *Smith v. Phoenix Ins. Co.*, 191.
 7. **ABSTRACT OF TITLE TO LAND, PURCHASER BOUND TO PROVIDE.**—Where the parties to a contract for the sale of land do not agree that the condition of the title shall be ascertained from any particular abstract, nor from an abstract to be furnished by the vendor, it is incumbent upon the purchaser to provide the abstract, and to satisfy himself as to the condition of the title. *Easton v. Montgomery*, 123.
 8. **EXAMINATION OF TITLE TO LAND, REASONABLE TIME FOR, IMPLIED WHEN.**—Where a memorandum of the sale of land provides for the "title to prove good, or no sale, and this deposit to be returned," but specifies no time within which the examination of the title is to be made, a reasonable time is implied. *Easton v. Montgomery*, 123.
 9. **VENDEE OF LAND NOT ENTITLED TO CONVEYANCE UNTIL FULL PAYMENT OF PURCHASE-MONEY.**—The general rule is, that the purchaser of land is not entitled to a conveyance until full payment of the purchase-money, and that the acts of payment and conveyance being mutual and dependent, neither party is in default until after tender and demand by the other. *Easton v. Montgomery*, 123.

10. **IMPERFECT TITLE.** — If, after a contract is made for the sale of real property, it is ascertained that the title of the vendor is not perfect, the vendee must either rescind the contract and restore possession, or accept the title as it is and pay the purchase price. He cannot, while declining to pay such price on account of the defect in the title, hold possession of the property until the title shall be perfected. *Worley v. Nethercott*, 209.
11. **DEFECTS IN TITLE TO LAND, DUTY OF PURCHASER TO POINT OUT.** — A purchaser who undertakes to examine the title to land for the purpose of determining whether it is good or not is bound to make a complete examination thereof, and to point out the defects, if any, to the vendor, who, in the absence of any time fixed by agreement, will then have a reasonable time within which to remove those defects, and if the vendor fails within such time to remedy the defects thus pointed out, the purchaser, in any action to recover the purchase-money or deposit paid by him upon the ground that the title is defective, is limited to such defects as were then pointed out. *Easton v. Montgomery*, 123.
12. **PURCHASER OF LAND NOT ENTITLED TO RESCIND CONTRACT OF SALE CANNOT MAINTAIN ACTION TO RECOVER DEPOSIT.** — A purchaser of land cannot maintain an action upon a contract of sale which he has no right to rescind, without full performance on his part prior to the default of the vendor; and without alleging or proving such performance he cannot maintain an action to recover purchase-money paid in part performance of his contract, while it is still in existence and uncompleted. *Easton v. Montgomery*, 123.
13. **DEPOSIT ON SALE OF LAND, ACTION TO RECOVER, WHEN ONLY MAINTAINABLE.** — It is only when the vendor of land is guilty of fraud either at the time of entering into the contract of sale knowing that it was out of his power to perform it, or by his subsequent acts in putting, it out of his power to perform, that the purchaser is entitled to treat the contract as rescinded, and to bring his action to recover the deposit. *Easton v. Montgomery*, 123.
14. **LOSS FROM DESTRUCTION OF PROPERTY, ON WHOM MUST FALL.** — If a lease is made containing an agreement that the lessor will sell and the lessee will buy the leased property at the expiration of the lease, and a material part of it, before the termination of the lease, is destroyed by fire, the obligation of the lessee to purchase ends with such destruction. *Smith v. Phoenix Ins. Co.*, 191.
15. **INSURANCE COLLECTED BY A VENDOR ON A POLICY OF INSURANCE IS HELD IN TRUST FOR HIS VENDEE, AND MUST BE APPLIED TO THE PAYMENT OF THE UNPAID PURCHASE-MONEY.** *Smith v. Phoenix Ins. Co.*, 191.

See AUCTION; CONTRACTS, 7.

VENUE.

See INSURANCE, 54.

VERDICT.

See REPLEVIN, 5; TRIAL, 8-11.

VICE-PRINCIPAL.

See RAILROAD COMPANIES, 2.

WAIVER OF DEMAND.

See BANKS AND BANKING, 2; DEBTOR AND CREDITOR, 1.

WATER COMPANIES.

See DAMAGES, 2-4.

WATERCOURSES.

1. **RIPARIAN RIGHTS.** — PRIORITY OF APPROPRIATION OF WATER IN POINT of time gives superiority of right among appropriators for like beneficial purposes. *Strickler v. City of Colorado Springs*, 245.
2. **APPROPRIATOR'S RIGHT IN TRIBUTARIES.** — PRIOR APPROPRIATOR of water from the main stream is not subject to subsequent appropriation from its tributaries by others. *Strickler v. City of Colorado Springs*, 245.
3. **APPROPRIATION — CHANGING POINT OF DIVERSION.** — A prior appropriator of water from a stream may change the point of diversion and the place of use, without affecting his right of priority, so long as the rights of others are not thereby injuriously affected. *Strickler v. City of Colorado Springs*, 245.
4. **RIGHT OF PRIOR APPROPRIATOR — CONSTITUTIONAL LAW.** — The right of a prior appropriator to the use of the water of a stream acquired prior to the adoption of the Colorado constitution cannot be taken by a city for domestic use without compensation. *Strickler v. City of Colorado Springs*, 245.
5. **APPROPRIATION — SALE OF WATER RIGHT.** — The prior appropriator's right to the use of the water of the stream is a property right which he may transfer by sale, unconnected with the land, so long as the rights of others are not injuriously affected thereby. *Strickler v. City of Colorado Springs*, 245.
6. **NAVIGABLE STREAMS IN THE UNITED STATES ARE OF THREE CLASSES:**
 1. Tidal streams, that are held navigable in law, whether navigable or not;
 2. Those that, although non-tidal, are yet navigable in fact for boats or lighters, and susceptible of valuable use for commercial purposes;
 3. Those streams which, though not navigable for boats or lighters, are floatable, or capable of valuable use in bearing logs or the products of mines, forests, and tillage of the country they traverse to mills and markets. *Gaston v. Mace*, 848.
7. **THE NAVIGABILITY OF FRESH-WATER NON-TIDAL STREAMS** is a question of fact, and the burden of proof must be assumed by him who claims them to be navigable, and he must show that they are in fact navigable for boats or lighters, and susceptible of valuable use for commercial purposes in a natural state, unaided by artificial means or devices, for such length of time during the year as will make them valuable to the public as public highways, though he need not show that they are thus valuable during the entire year. *Gaston v. Mace*, 848.
8. **FLOATABLE STREAMS.** — FOR THE DESTRUCTION OF A DAM MAINTAINED ACROSS a floatable stream, by logs placed therein, there can be no recovery, because the land-owner has no right to maintain his dam in such a manner as to interfere with the right of the public to float logs and other products down the stream. *Gaston v. Mace*, 848.
9. **FLOATABLE STREAMS, RIGHT TO MAINTAIN MILLS AND DAMS THEREIN.** — A land-owner has a right to build a mill, and erect a dam across a

stream to accumulate water to run the mill; but the maintaining of such a dam cannot give him any prescriptive right to prevent the use of the stream as a public highway. *Gaston v. Mace*, 848.

10. **FLOATABLE STREAMS, RESPECTIVE RIGHTS OF THE LAND-OWNER AND OF THE PUBLIC IN.** — While the owner of land through which a floatable stream runs owns the bed as well as the banks thereof, he has no property in the water itself, aside from that which is necessary for the gratification of his natural and ordinary wants, and of having it flow without disturbance or material diminution by any other proprietor. His use of the stream and its waters must be reasonable, and not inconsistent with the reasonable enjoyment of others who have an equal right to its use. The public has the right to use it as a public highway to float lumber and other products to mill and market, and the land-owner has no right to unreasonably incommode and hinder the public use. *Gaston v. Mace*, 848.
11. **UNDERGROUND WATERS, RIGHT TO POLLUTE.** — The owner of land has no right to pollute underground waters running therein which, when they leave such land, flow into a spring on the land of an adjacent proprietor. Hence if the owner of land, or his tenant, erects a warehouse, and places and keeps coal-oil therein, which, leaking from the casks, saturates the ground, and pollutes a subterranean stream from which a spring on the land of an adjacent proprietor is fed, the latter may maintain an action for damages thus suffered by him. *Kinnaird v. Standard Oil Co.*, 545.

See EASEMENTS; NUISANCE, 2

WILLS.

1. **"LAWFUL HEIRS," AT WHAT TIME TO BE ASCERTAINED.** — Where a testator by his will, gives his property to his sister during her life, and, "at her decease, said estate to be distributed amongst my lawful heirs," the words "amongst my lawful heirs" have reference to the lawful heirs of the testator at the time of his death, and not to those who might be such at the time of the death of his sister, the tenant for life. *In re Tucker's Will*, 743.
2. **CONSTRUCTION OF THE WORD "ISSUE."** — If a bequest is made of a sum of money to S. for her life, and at her death to her husband, if then living, and if not to her issue, and she survives him, leaving children and grandchildren, the fund, on her death, vests in her children then living, and the descendants of her deceased children *per stirpes*; neither the administrator of her deceased child, nor the children of any of her children then living, has any interest therein. *Jackson v. Jackson*, 643.
3. **CONSTRUCTION — PRECATORY TRUSTS.** — When a testatrix bequeaths to her husband, the father of her children, "all my property, whether real, personal, or mixed, that he may use the same for the maintenance and education of my said children, and that he may, from time to time, advance to each, as he may deem best, to start them in life," and "I do hereby appoint my beloved husband my executor, with full power to control, manage, use, convey, sell, and dispose of said property as his own absolute property, without being required to file or render any account, or give any bail," the husband will take an absolute estate, not subject to any trust in favor of such children. *Randall v. Randall*, 373.
4. **CONFLICT OF LAWS.** — THE PROBATE OF A WILL GRANTED IN ANOTHER STATE, and which, by the laws of the state, is local, and does not affect

realty in other states, is not admissible in evidence in this state without re-probate here for the purpose of proving that the power of appointment, authorized to be exercised by will, has been so exercised. *Thrasher Ballard*, 894.

See DEVISE; PARENT AND CHILD; POWERS, 2

WITNESSES.

1. NON-RESIDENT — EXEMPTION FROM SERVICE OF PROCESS. — A resident of one state who comes into another as a witness in a cause pending there is exempt from the service of process for the commencement of a civil action against him in the latter state, and the privilege protects him in staying and returning, provided he acts *bona fide*, and without unreasonable delay. *Bolgiano v. Gilbert Lock Co.*, 582.
2. STATE CANNOT CONTRADICT ITS OWN WITNESS WHEN. — Where the state is neither surprised nor prejudiced by the testimony of a witness called by it, it cannot contradict him by introducing evidence of contradictory statements made by him out of court. *Rhodes v. State*, 429.

See CRIMINAL LAW, 2

WRIT OF POSSESSION.

See EJECTMENT, 3; INJUNCTION, 2



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